Supreme Court, U.S.

No. 06-1[illegible]

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In The

Supreme Court of the United States

RAYMOND D. MAY, et al.,

Petitioners,

v.

BP WEST COAST PRODUCTS LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Petroleum Marketing Practices Act ("PMPA") permits a motor fuel franchisor to solicit bids from third parties for the sale of its interest in marketing premises that are leased to its PMPA franchisees, through a process that it created pursuant to which third parties are forced into bidding on the value of the business "goodwill" that is not owned by the franchisor, but is owned by its franchisees.

2. Whether the factual question of a franchisor's subjective intent in deciding to nonrenew PMPA franchises can be *per se* decided, solely based on the franchisor's subjective declaration of good faith, without consideration of circumstantial evidence regarding such intent.

PARTIES TO THE PROCEEDINGS

The parties to the to the proceedings in the United States Court of Appeals for the Ninth Circuit for the case listed in the caption, in the Ninth Circuit case number 05-15076, were BP West Coast Products LLC, a Delaware limited liability company as the Plaintiff-Appellee and Raymond D. May; and Sharanjeet K. Ghumman as the Defendants-Appellants.

Joining this Petition for Writ of Certiorari pursuant to Rule 12.4 is Jasbir S. Tung who was a party to the United States Court of Appeals for the Ninth Circuit, case number 04-55491, as the Defendant-Appellant, the other party to which was also BP West Coast Products LLC as the Plaintiff-Appellee.

Also, joining this Petition for Writ of Certiorari pursuant to Rule 12.4 is Robert Greene who was a party to the United States Court of Appeals for the Ninth Circuit, case number 04-16703, as the Defendant-Appellant, the other party to which was also BP West Coast Products LLC as the Plaintiff-Appellee.

All three of the above-referenced judgments are attached in the accompanying appendix and are sought to be reviewed in this Petition for Writ of Certiorari because they involve closely related questions of law and fact.

CORPORATE DISCLOSURE STATEMENT

This Petition for Writ of Certiorari is not filed by or on behalf of any nongovernmental corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Raymond D. May, Sharanjeet K. Ghumman, Jasbir S. Tung and Robert Greene, jointly and respectfully petition for a writ of certiorari to review the respective judgments of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 447 F.3d 658. The opinions of the district courts (Pet. App. 15-39; 44-64; 69-99) are unreported.

JURISDICTION

The judgments of the court of appeals were entered on May 1, 2006 (Pet. App. 13) and May 4, 2006 (Pet. App. 42; 67). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 15 United States Code Section 2802(b)(3)(D)(iii)(I), (II) of the Petroleum Marketing Practices Act provides in pertinent part:

> For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship: . . . a determination made by the franchisor in good faith and in the normal course of business, if . . . such determination is . . . to sell such premises, or . . . in the case of leased marketing premises such franchisor, during the 90-day

> period after notification was given pursuant to section [2804] of this title either . . . made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

The provisions of the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801, et seq., 2802, et seq., 2803, et seq., 2804, et seq., 2805, et seq., and 2806, et seq. are lengthy and, therefore, set out in Appendix 100-126, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

The jurisdiction of the courts of first instance was based on the PMPA, 15 U.S.C. § 2805(a).

This case presents important and recurring questions pertaining to the interpretation of the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801, et seq. Although various district and circuit courts have issued sometimes inconsistent opinions pertaining to the PMPA, the Supreme Court has never interpreted the Act.

The PMPA was designed to offer additional protection to petroleum products franchisees because Congress felt that the large oil company franchisors had excessive bargaining power and that "remedying the disparity of bargaining power between franchisors and franchisees" provided a need for the legislation. *Unocal Corp. v. Kaabipour*, 177 F.3d 755, 762 (9th Cir. 1999), *quoting*, S. Rep.

No. 95-731, 18-19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 877.

The present case involves a recurring situation wherein a motor fuel franchisor, BP West Coast Products LLC ("BPWCP"), decided to nonrenew a number of its franchises being operated by independent gasoline dealers under its trademark brand name, "ARCO" and "am/pm." All such franchisees leased the marketing premises where they operated their respective businesses, directly from the franchisor, BPWCP. Under Section 2802(b)(3)(D)(iii)(I), (II) of the PMPA, BPWCP was required to tender to its franchisees either a *bona fide* offer for the sale of the franchisor's interests or give the franchisees offers of a right of first refusal made by third parties "to purchase such franchisor's interest in such premises."

In the present case, BPWCP obtained offers for the subject gasoline station facilities from third parties who submitted bids pursuant to a unique "sealed bid process" that informed the bidders that the properties were being sold as operational ARCO and am/pm sites. The facilities included mandatory fifteen-year ARCO and am/pm branded franchise agreements with BPWCP, which insured that the locations would continue to be operated as ARCO gas stations by the dealers who purchased them. The bidding materials also included confidential information regarding the subject BPWCP's franchisees' gasoline volumes and convenience store sales. The bidding process also provided an incentive for third parties to bid higher values by paying such third party bidders a "break up fee" based on a percentage of the overall bid (rather than a flat amount or based on the amount of deposit). The third party bidders acknowledged that they actually considered the value of the franchisees' goodwill in their bids and

indicated that they included the goodwill of an already functioning business along with the existing customer base and income stream. Additionally, each of the franchisees who are parties to this Petition obtained MAI appraisals which resulted in fair market values that were significantly less than the offers from the third party bidders.

In an opinion by Judge Cowan, the Ninth Circuit declined to consider these factors as having any bearing on the factual question of whether BPWCP's "initial determination to sell was made in bad faith." In essence, the Ninth Circuit found that the PMPA did not preclude a franchisor from creating a process pursuant to which third parties were forced into including goodwill value that belonged to the franchisees in their offers. Likewise, the Ninth Circuit's decision stands for the conclusio~ that circumstantial evidence cannot create a genuine issue of material fact pertaining the franchisor's subjective intent.

The Appellants contend that BPWCP decision to sell their gasoline service station facilities was not made in good faith and in the normal course of business. Appellants contend that the scheme pursuant to which BPWCP solicited bids from third parties and its conduct forced third parties to include the business goodwill value belonging to franchisees, like themselves, in their bids. These bids were ultimately given to franchisees as offers of right of first refusal ("ROFR"). BPWCP deliberately set up a system that would insure bids from third parties that substantially exceeded the fair market value due to the inclusion of business goodwill value that belongs to the franchisees rather than BPWCP. BPWCP's conduct in the way that it set up the third party bidding process and vis a vis third parties and its franchisees is circumstantial

evidence of the fact that BPWCP's decision to nonrenew Appellants' franchises was not made in good faith and in the normal course of business, in violation of the PMPA.

REASONS FOR GRANTING THE WRIT

The PMPA clearly provides that before selling a leased marketing premises, a franchisor must "either: (I) [make] a bona fide offer to sell, transfer, or assign to the franchisee **such franchisor's interests** in such premises; or (II) if applicable, [offer] the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase **such franchisor's interest** in such premises." 15 U.S.C. § 2802(b)(D)(iii) (emphasis added). Consequently, the plain language of the PMPA mandates that the franchisor may sell only *such franchisor's interest*. The converse is also true, in that the franchisor may not sell interest that does not belong to it, but belongs to the franchisee, namely the franchisee's business goodwill.

Even the Ninth Circuit in its opinion which is the subject of this Petition recognized the fact that franchisees' own "substantial goodwill" which they have "built up" and that "one specific purpose of the PMPA is to protect a franchisee who has built up substantial goodwill in a station from having the franchise arbitrarily taken." (Pet. App. 7, quoting, *Brach v. Amoco Oil Co.*, 677 F.2d 1213, 1220 (7th Cir. 1982) (citing statement of Rep. Mikva, 123 Cong. Rec. 10,386 (1977)). Consequently, the subject Ninth Circuit decision is inconsistent with the express provisions and intent of the PMPA by permitting a franchisor to market and ultimately sell something that it does not own

and which is protected by the PMPA, its franchisee's goodwill in the gas station business.

Thus, in holding that a franchisor may set up a process pursuant to which it directly solicits bids from third parties on the value of its franchisees' business goodwill, the Ninth Circuit is not only at odds with the plain language of the PMPA, but with its own previous decision that the franchisor's interest in leased marketing premises does not include the value franchisees' *own goodwill*. *Ellis v. Mobil Oil*, 969 F.2d 784, 788 (9th Cir. 1992). As the court in *Ellis* stated, "[a] bona fide offer in this case would not include the value of the franchisee's own goodwill or Mobil's franchise value of the station."[1]

> When a third party's offer is in the form of a single transaction for cash, the court can justifiably infer that the amount of an arms' length offer represents the value of the station. On such facts, all a franchisee is entitled to is a right of first refusal. *Id.* at 786, *citing*, *Ballis v. Mobil Oil Corp.*, 622 F. Supp. 473, 475 (N.D. Ill. 1985).

The instant facts, however, do not involve a mere third party's "arms' length offer." Rather, they involve a situation wherein the third party offers were manufactured by BPWCP through a bidding process that it created to include the value of the business goodwill that belonged to its franchisees.

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[1] Although *Ellis v. Mobil* involves the situation wherein the franchisor tendered a *bona fide* offer and the present underlying case involves a situation wherein BPWCP tendered a right of first refusal, the principal that the franchisor may not sell *the franchisee's own goodwill* equally applies in both situations.

In *Unocal Corp. v. Kaabipour*, the Ninth Circuit held that Union Oil could sell its motor fuel station properties as "a going concern, including trademarks, franchise operations, and service station premises. If, as appears here, the particular details of the financing of the sale transaction had no outward impact on the interests of the franchisees, there is no reason to find a PMPA violation." *Unocal Corp. v. Kaabipour, supra,* 177 F.3d at 765. In *Unocal Corp. v. Kaabipour*, the franchisor, Union Oil Company withdrew from the retail marketing of motor fuel in the states of Alaska, Arizona, California, Hawaii, Nevada, Oregon and Washington. In so doing, it sold all of its marketing assets to Tosco Corporation. A number of former Union Oil franchisees objected to the sale on various grounds. However, given that their franchises were not terminated or nonrenewed because Tosco Corporation merely took over the franchise responsibilities for Union Oil, the court found no violations. *Id.* In the present case, however, BPWCP did nonrenew the Appellants' franchises. The process that BPWCP set up intentionally and actually resulted in third party offers on the value of the "going concern" of the ARCO and am/pm businesses and the goodwill belonging to the franchisees. This is inconsistent with both the PMPA and prevailing case law.

The instant Ninth Circuit decision also creates a rift with other courts that have found that Subsection II of Section 2802(b)(3)(D)(iii) requires that,

> the third party's offer in which the franchisee is given the right of first refusal must be an offer to purchase the "franchisor's interest" in the premises. . . . The land and the personal property is the "franchisor's interest." *Greco v. Mobil Oil Corp.*, 597 F. Supp. 468, 473 (D. Ill. 1984).

Courts in other circuits found that the PMPA is directed in part at "protecting the buildup of goodwill by those individuals who have invested time and money into the operation of a franchise" and "to prevent the 'appropriation of hard-earned goodwill which occurs when a franchisor arbitrarily takes over a business that the franchisee has turned into a successful going concern.'" *Brewer v. Exxon Corp.*, 626 F. Supp. 76, 79-80 (E.D. Tenn. 1985), *quoting*, *Brach v. Amoco Oil Co.*, 677 F.2d 1213, 1220 (7th Cir. 1982); *see also, Ewing v. Amoco Oil Co.*, 823 F.2d 1432, 1438 (10th Cir. 1987). The Ninth Circuit, however, ignores the franchisees' interest and right to retain the goodwill by allowing the franchisor to market the goodwill through advertising of gasoline volumes and convenience store sales, as if the goodwill were its own to sell.

Additionally, the Ninth Circuit's decision effectively ignored all of the circumstantial evidence of BPWCP's subjective intent and found that it acted in good faith and in the normal course of business as a matter of law. Other courts have held that the "subjective good faith, like intent, need not be proved with direct evidence of an actual state of mind. . . . in order to establish bad faith the dealer need not coax a confession of impermissible motive from the company officials." *Munno v. Amoco Oil Company*, 488 F. Supp. 1114, 1120-1121 (D. Conn. 1980). The Ninth Circuit, however, ignored such evidence of BPWCP's intent, finding its self serving declarations of good faith to be conclusive proof of intent.

As such the subject Ninth Circuit opinion creates an inconsistency in the interpretation and application of the PMPA which is important to the motor fuel station industry and which is in need of resolution. Given that the

Supreme Court has never reviewed or addressed any cases pertaining to the PMPA, this is a perfect opportunity to bring clarity to the statute.

This Court should therefore grant certiorari to overturn the Ninth Circuit's ruling and make clear that (1) a PMPA franchisor may not market and sell what does not belong to it, its franchisees' business goodwill and (2) that circumstantial evidence may be properly considered to prove the franchisor's subjective intent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 28, 2006

447 F.3d 658

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BP WEST COAST PRODUCTS LLC, a Delaware limited liability company,

Plaintiff-Appellee,

v.

RAYMOND D. MAY; SHARANJEET K. GHUMMAN,

Defendants-Appellants,

and

NANDI, INC.; WEST JET, INC.,

Defendants.

No. 05-15076

D.C. No. CV-02-00529-LRH

OPINION

Appeal from the United States District Court for the District of Nevada (Reno)
Larry R. Hicks, District Judge, Presiding

Argued and Submitted
December 8, 2005 – Pasadena, California

Filed May 1, 2006

Before: Harry Pregerson, Robert E. Cowen,* and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Cowen

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* The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

COUNSEL

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Jeffrey M. Hamerling, Esq., San Francisco, California, for the appellee.

OPINION

COWEN, Circuit Judge:

Raymond May and Sharanjeet Ghumman appeal the order of the district court granting summary judgment in favor of BP West Coast Products LLC ("BPWCP"). The district court concluded that BPWCP did not violate the Petroleum Marketing Practices Act ("PMPA") when it sold its interests in the gas facilities operated by May and Ghumman and non-renewed its franchise relationships with May and Ghumman. The principal issue on this appeal is whether BPWCP acted in good faith and in the normal course of business when it determined to sell the facilities in compliance with the PMPA. We have jurisdiction pursuant to 28 U.S.C. § 1291 and will affirm.

I.

BPWCP owns the real property and improvements of several ARCO-branded gasoline facilities in the western United States. BPWCP leased some of the facilities to franchisees as lessee dealers. May and Ghumman were lessee dealers who operated gas stations and am/pm Mini Markets pursuant to written franchise agreements with BPWCP.

As lessee operators, they were required to pay monthly rent and royalties on fuel sales. They could not discontinue the ARCO brand at their facilities and had to renew their respective agreements with BPWCP every three years, or risk being discontinued.

Every year BPWCP's Real Estate Manager and Regional Sales Managers evaluate BPWCP's capital investments and the performance of its retail facilities in each of its markets. The managers consider various economic, financial, and competitive factors. The economic factors include sales and growth patterns, and current and future demographics in the markets. The financial factors include the present value of the future estimated income from the facilities, the size of the lots of the facilities, gasoline volume sales, sales from any am/pm Mini Markets located on the facilities, the need to make improvements or upgrades to the facilities, the ability to expand the facilities, and the rate of return on the capital investment in the facilities. The competitive factors include the presence or absence of ARCO-branded and competing stations in the vicinity of the facilities, and regulatory barriers to entry into the markets. In 2001, the managers considered the above factors and recommended to the appropriate decision makers that BPWCP sell all of its interests in the northern Nevada market, including its interests in the facilities owned by May and Ghumman. The recommendation to sell was accepted.

The real estate department arranged for the facilities to be sold through a sealed bid process conducted by a marketing company, the National Real Estate Clearinghouse ("NRC"). The decision to solicit sealed bids in such a situation was unique for BPWCP. Historically, when BPWCP desired to sell property and maintain it as an

ARCO-branded facility, it typically negotiated directly with the dealer rather than solicit bids. In this case, however, BPWCP notified May and Ghumman that it was considering recovering its capital investment in their facilities, informed them about the sealed bid process, and encouraged them to participate.

As part of the bidding process, NRC marketed the facilities, educated potential buyers about the process, and prepared written materials and due diligence packages. The bidding materials related that the properties were to be sold as operational ARCO and am/pm sites. The facilities included a mandatory fifteen-year ARCO and am/pm branded franchise agreement with BPWCP. The bidding materials also contained confidential information regarding BPWCP's franchisees' convenience store sales and gasoline volumes. The materials further informed bidders that BPWCP reserved the right to withdraw any property from the sealed bid sale at any time, without notice, in its sole discretion. BPWCP also reserved the right to overlook minor inconsistencies or non-conformance in any bid.

Under the NRC procedure, third parties prequalified before submitting their bids by attending a NRC-conducted bid seminar, and by providing information regarding their credit history and financial resources. The third parties had to make their bids on a preset purchase agreement and include a bid deposit equal to 2.5% of the sale price being offered. Successful bidders had to increase their bid deposit to 10% of the purchase price.

Through the above bidding process, an independent third party, Bechara Victor Honein, offered to purchase May's facility for $1.4 million with a one-percent premium of $14,000 for BPWCP's cost in selling the facility. In

making his bid, Honein attributed $850,000 to the goodwill of the business. As to the Ghumman facility, independent third party Badru Khan submitted a bid of $890,000 with an $8,900 premium. In determining his bid, Khan included the value of the "goodwill of an already functioning business along with the existing customer base and income stream, belonging to such business at the time of [his] bid." (ER 1365, ¶ 6.) Neither BPWCP nor NRC had any reason to believe that these third party bidders would withdraw their offers or not close escrow on the facilities.

The third party bidders agreed to enter into a "contract dealer" franchise with BPWCP by signing a fifteen-year fuel supply and am/pm Mini Market agreement with BPWCP, if the deal closed. This contract dealer relationship with the third party bidders differed significantly from the expiring lessee dealer franchise relationship. A contract dealer does not pay rent, pays a lower royalty, and is not limited to the ARCO brand after the initial franchise expires. A contract dealer also must purchase additional equipment and materials, as well as obtain all necessary licenses and permits (including a liquor license and permit to operate the facility as an ARCO-branded facility).

After the bidding had concluded, BPWCP notified May and Ghumman of its decisions to sell their facilities and nonrenew their franchises. The notices cited to PMPA section 2802(b)(3)(D) and explained that BPWCP "ha[d] made a determination in good faith and in the normal course of business to sell the premises upon which [their facilities were] located." (ER 244.) BPWCP further informed May and Ghumman that it would either make them a bona fide offer to purchase their facilities or offer

them a right of first refusal ("ROFR") if BPWCP obtained an offer from a third party to purchase their facilities.

On August 8, 2002, BPWCP offered May a ROFR to purchase its interests in his facility for the same $1.4 million purchase price offered by Honein. BPWCP also offered Ghumman a ROFR to purchase its interests in his facility for the same $890,000 offered by Khan. Unlike Honein and Khan, May and Ghumman did not have to pay any premium for buying the facilities. They were also not required to purchase fuel from BPWCP and operate an am/pm Mini Market franchise on the facilities for the next fifteen years. Instead, BPWCP offered them the choice of buying their respective facilities and either (1) entering into the same new contract dealer relationship as Honein and Khan; or (2) continuing to operate under their respective existing franchise agreements until the end of their three-year terms, at which time they could debrand and sell other gasoline, or cease selling gasoline completely.

May and Ghumman obtained appraisals of the "As Is" fair market value of the land, improvements, and BPWCP-owned equipment in their facilities. May's facility was appraised at $1,030,000, rendering BPWCP's ROFR offer 36% in excess of his appraisal. Ghumman's facility was appraised at $410,000, rendering BPWCP's ROFR offer 117% in excess of his appraisal. Both May and Ghumman accepted BPWCP's ROFR offers "under protest" with reservation of all legal rights.

BPWCP filed a complaint with the United States District Court for the District of Nevada seeking a declaratory judgment that it had fully complied with the PMPA when it non-renewed the franchises. May and Ghumman answered the complaint and filed a counterclaim for

damages, injunctive relief, and declaratory relief for violations of the PMPA. Following extensive discovery, the district court granted summary judgment to BPWCP.

II.

"The PMPA is intended to protect gas station franchise owners from arbitrary termination or nonrenewal of their franchises with large oil corporations and gasoline distributors, and to remedy the disparity in bargaining power between parties to gasoline franchise contracts." *DuFresne's Auto Serv., Inc. v. Shell Oil Co.*, 992 F.2d 920, 925 (9th Cir. 1993). One specific purpose of the PMPA is to protect a franchisee who has built up substantial goodwill in a station from having the franchise arbitrarily taken. *See Brach v. Amoco Oil Co.*, 677 F.2d 1213, 1220 (7th Cir. 1982) (citing statement of Rep. Mikva, 123 Cong. Rec. 10,386 (1977)). Despite the protection offered to franchisees, the PMPA was also enacted to provide "'adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences.'" *Unocal Corp. v. Kaabipour*, 177 F.3d 755, 762 (9th Cir. 1999) (quoting S.Rep. No. 95-731, at 18-19 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 873, 877).

To achieve these goals, the PMPA "establish[es] 'minimum Federal standards governing the termination and non-renewal of franchise relationships for the sale of motor fuel by the franchisor or supplier.'" *Fresher v. Shell Oil Co.*, 846 F.2d 45, 46 (9th Cir. 1988) (per curiam) (quoting S. Rep. No. 95-731 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 873). The PMPA prohibits a service station franchisor from terminating or declining to renew an

existing franchise relationship unless one of the conditions set forth in 15 U.S.C. § 2802(b) has been satisfied.[1] Pursuant to § 2802(b)(3)(D)(i)(III), a franchisor may decline to renew a franchise agreement having a term of three or more years and decide to sell such premises if such "determination [is] made by the franchisor in good faith and in the normal course of business." Before selling leased marketing premises, a franchisor must "either: (I) [make] a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or (II) if applicable, [offer] the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises." 15 U.S.C. § 2802(b)(3)(D)(iii).

Section 2802(b)(3)(D)(i)(III)'s good faith requirement "looks to whether the franchisor's actions are designed to 'conceal selective discrimination against individual franchises.'" *Kaabipour,* 177 F.3d at 767 (citation omitted). "This good faith test is meant to preclude sham determinations from being used as an artifice for termination or nonrenewal." *Valentine v. Mobil Oil Corp.,* 789 F.2d 1388, 1392 n.7 (9th Cir. 1986) (quoting S. Rep. No. 95-731, at 37 (1978) *as reprinted in* 1978 U.S.C.C.A.N. 873, 895-96). The test for determining good faith is subjective, and the court should look to the franchisor's intent rather than the effect of the franchisor's actions. *See Svela v. Union Oil Co. of Cal.,* 807 F.2d 1494, 1501 (9th Cir. 1987). Objective

[1] The franchisee bears "the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship." 15 U.S.C. § 2805(c). The franchisor then bears "the burden of going forward with evidence to stablish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803." *Id.*

evidence, such as internal company documents, may provide adequate proof of good faith. *See Valentine,* 789 F.2d at 1393 (relying on franchisor's business plans).

A franchisor meets the "normal course of business" requirement if the determination was "the result of the franchisor's normal decision making process." *Valentine,* 789 F.2d at 1392 n.7 (quoting S. Rep. No. 95-731, at 37 (1978) *as reprinted in* 1978 U.S.C.C.A.N. 873, 895-96). "In determining whether [a franchisor] made its decision to withdraw in the normal course of business, the evidence indicative of good faith is likely to be instructive." *Beck Oil Co. v. Texaco Ref. & Mktg., Inc.,* 25 F.3d 559, 562 (7th Cir. 1994).

The inquiry of whether the franchisor made the substantive decision in good faith and in the normal course of business "tests the honest commercial judgment of the franchisor." *Sandlin v. Texaco Ref. & Mktg., Inc.,* 900 F.2d 1479, 1481 (10th Cir. 1990). "These tests provide adequate protection of franchisees from arbitrary or discriminatory termination . . . yet avoid judicial scrutiny of the business judgment itself. Thus, it is not necessary for the courts to determine whether a particular marketing strategy, such as a market withdrawal, . . . is a wise business decision." *Massey v. Exxon Corp.,* 942 F.2d 340, 345 (6th Cir. 1991) (quoting S. Rep. No. 95-731, at 37 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 873, 896); *accord Svela,* 807 F.2d at 1501 (noting that Congress did not intend for courts to intrude into the marketplace by permitting "judicial second-guessing of the economic decisions of franchisors").

The district court ruled as a matter of law that BPWCP made the determination to sell the facilities

operated by May and Ghumman in good faith and in the normal course of business. To establish its affirmative defense, BPWCP presented substantial and uncontradicted evidence that the sale process above took place because its Real Estate Manager and Regional Sales Managers recommended that it sell its facilities in the northern Nevada market based on a routine annual review that evaluated numerous economic, financial, and competitive factors. After obtaining bids on the facilities, BPWCP notified May and Ghumman of its decision to sell their facilities and nonrenew their franchises.

May and Ghumman contend that there is a genuine issue of material fact as to whether BPWCP's decision to sell their facilities was made in good faith because BPWCP's bidding structure and conduct forced third parties to include business goodwill value that belonged to May and Ghumman in their bids. In support of their argument, they note that BPWCP wanted to sell locations that could continue to be operated as ARCO gas stations by the dealers that purchased them. The sites were to be sold as operational sites with a fifteen-year franchise agreement that was mandatory to all third party bidders. Furthermore, May and Ghumman argue that BPWCP deliberately advertised confidential convenience store sales and gasoline volumes of its franchisees for third party bidders to consider in their bid. BPWCP created an incentive for third parties to bid higher values by providing for a "break up fee" based on a percentage of the overall bid price. In addition, May and Ghumman observed that the bids on their facilities were much higher than the fair market appraised values which they obtained. Accordingly, they contend that the third party bidders considered goodwill in their bids. Finally, Khan

admitted that he included the value of the goodwill in his bid on Ghumman's facility, and Honein acknowledged that he included the goodwill value in his bid on May's facility.

Even if the bid process encouraged bidders to include goodwill value, however, the PMPA does not protect against the loss of goodwill as such. Nothing before us indicates that the decision to sell was motivated by any reasons or concerns except pure business considerations. Obtaining the value of goodwill in the sale of the facilities does not constitute evidence that BPWCP's initial determination to sell was made in bad faith; *i.e.*, that the determination to sell involved selective discrimination, procedural irregularities, or was a pretext for nonrenewal. Absent some evidence of bad faith in the initial decision-making to sell the facilities, we are precluded from second-guessing BPWCP's economic determination to withdraw from the market in northern Nevada and sell these facilities. *See Svela*, 807 F.2d at 1501.

May and Ghumman also claim that BPWCP did not decide to sell the facilities in the normal course of business because historically BPWCP would negotiate directly with the dealer rather than solicit bids if it wanted to sell a property and keep it as an ARCO-branded facility. While the record reflects that BPWCP's bidding process was novel, the decision to set up the bidding process occurred as a result of the yearly evaluation performed by BPWCP's Real Estate Manager and Regional Sales Managers. Because the decision to set up the bidding process occurred during BPWCP's normal decision making process, May and Ghumman have failed to establish a genuine issue of material fact as to the normal course of business requirement.

Finally, May and Ghumman also assert that BPWCP accepted a bid from Khan on the Ghumman facility even though he was not a "ready, willing, and able buyer." They contend that Khan was not a "ready, willing, and able buyer" because he had not obtained a loan prior to BPWCP's conditional acceptance of his bid. The bidding procedure required third party bidders to make their bids on a preset purchase agreement and include a bid deposit equal to 2.5% of the sale price being offered. Successful bidders had to increase their bid deposit shortly thereafter to 10% of the purchase price. We are satisfied that this procedure is sufficient to produce a ready, willing, and able buyer.

III.

For the reasons set forth above, we find no error in the order of the district court granting summary judgment to BPWCP.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BP WEST COAST PRODUCTS LLC, a Delaware limited liability company, Plaintiff-Appellee, V. RAYMOND D. MAY; et al., Defendants-Appellants, And NANDI, INC.; et al., Defendants.	No. 05-15076 D.C. No. CV-02-00529-LRH **JUDGMENT**

Appeal from the United States District Court for the District of Nevada (Reno).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada (Reno) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

Filed and entered 05/01/06

UNITED STATES DISTRICT COURT

***** DISTRICT OF NEVADA

BP WEST COAST PRODUCTS LLC,,

Plaintiff,

V.

RAYMOND MAY, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **CV-N-02-529--LRH(VPC)**

(Filed Dec. 3, 2004)

XX **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered

IT IS ORDERED AND ADJUDGED that the Plaintiff's Motions for Summary Judgment in these declaratory relief actions (Docket Nos. #56 & 57) are **GRANTED**.

Date: December 3, 2004

LANCE S. WILSON, CLERK

/s/ Brenda L. Gorbet
By: BRENDA L. GORBET
Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

BP WEST COAST PRODUCTS LLC, a Delaware limited liability company, Plaintiff, v. RAYMOND MAY; SHARANJEET GHUMMAN, Defendants.	CV-N-02-0529-LRH (VPC)
	ORDER
	(Filed Dec. 2, 2004)
CONSOLIDATED CASES	

Before the Court is Plaintiff BP West Coast Products, LLC's (hereinafter "Plaintiff") Motions for Summary Judgment (Docket Nos. 56 & 57). The Defendants Raymond May and Sharanjeet Ghumman (collectively referred to as "Defendants") have filed an opposition and Plaintiff has replied. After consideration of the filings and evidence presented in support of, and in opposition to, the motion for summary judgment, the Court concludes that Plaintiff is entitled to summary judgment. That is, the Court declares that Plaintiff has not violated the Petroleum Marketing Practices Act ("PMPA"). 15 U.S.C. § 2801 *et seq.*

I. BACKGROUND

Plaintiff sought to sell a number of its ARCO-branded gasoline station facilities. Plaintiff maintains that it

sought to sell the facilities to recover its capital investment. To accomplish its objective, the Plaintiff listed nearly fifty facilities with a real estate marketing company and received offers from independent third parties. Two of the facilities were located in Reno and Minden, Nevada, and were operated by Defendants May and Ghumman as franchisees and lessees pursuant to separate written franchise agreements. May's franchise agreement was to expire on March 1, 2003, and Ghumman's franchise agreement was to expire on June 1, 2004.

Pursuant to the PMPA, the Plaintiff notified both Defendants of its decision to sell the facilities, and nonrenew their lessee franchise relationships at the end of their respective terms. Plaintiff listed the facilities with a real estate marketing company, National Real Estate Clearinghouse, Inc.("NRC"), as its agent for the purpose of obtaining separate sealed bids for the facilities operated by the Defendants as well as other facilities. NRC marketed the facilities and informed the prospective purchasers that they were not purchasing the existing franchises or the franchise-owned equipment. Moreover, NRC informed the prospective purchasers that they would not be able to operate any of the existing franchises until the existing franchise relationships expired by their terms.

Plaintiff received an offer of $1.4 million from an independent third party for the facility operated by Defendant May. Plaintiff received an offer of $890,00 from an independent third party for the facility operated by Defendant Ghumman. Both third-party bidders also agreed to enter into new "contract dealer" relationships with the Plaintiff by agreeing to fifteen-year ARCO-branded gasoline supply agreements and franchises.

Plaintiff offered each Defendant a right of first refusal ("ROFR") to purchase the respective facility. Unlike the third-party bidders, the Defendants had the choice to either enter into new "contract dealer" relationships, or to discontinue their facilities as ARCO-branded facilities.

The Defendants each accepted the individual ROFR, purchased the facilities they had operated, and agreed to long-term supply agreements and franchises. However, the Defendants did so "under protest." The Defendants claim they paid too much for the respective facilities. Their argument in this regard is that the Plaintiff should have given them a discount from the market price for the "goodwill" they claim in their respective businesses. Defendant May claims he overpaid by $370,000, and Ghumman claims he overpaid by $480,000.

II. STANDARD

A motion for summary judgment is a procedure that terminates, without a trial, actions in which "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A summary judgment motion may be made in reliance on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." *Id.*

The movant is entitled to summary judgment if the nonmoving party, who bears the burden of persuasion, fails to designate " 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)). Thus, to preclude a grant of summary judgment, the nonmoving party must set forth " 'specific facts showing that there is a

genuine issue for trial.'" *Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). The substantive law defines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All justifiable inferences must be viewed in the light most favorable to the nonmoving party. *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001) (citing *Zenith Radio Corp.*, 475 U.S. at 587).

Although the nonmoving party has the burden of persuasion, the party moving for summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Metro Indust., Inc. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir. 1996). That burden is met by showing an absence of evidence to support the nonmoving party's case. *Celotex Corp.*, 477 U.S. at 325. The burden then shifts to the nonmoving party to set forth specific facts demonstrating that there is a genuine issue for trial. *Liberty Lobby, Inc.*, 477 U.S. at 250. In meeting this burden, the nonmoving party must go "beyond the pleadings and by its own evidence present specific facts showing that there is a genuine issue for trial." *Far Out Prod. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001) (citing *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996)) (quotations omitted).

III. JUDICIAL NOTICE

Plaintiff and Defendants request that the Court take judicial notice of a number of court filings in other federal cases. Plaintiff requests the Court take judicial notice of an order granting summary judgment in *BP West Coast Products LLC v. Tung*, Case No. EDCV 02-1095-(VAP)

(SGL), among others. Plaintiff also requests the Court take judicial notice of an order granting the Plaintiff summary judgment in *BP West Coast Products LLC v. Robert Greene,* CV-F-02-6257-AWI-SMS(2004). *BP West Coast Products LLC v. Greene,* is a recently published decision out of the Eastern District of California. 318 F.Supp.2d 987 (E.D.Cal. 2004). Therefore, the Court may certainly take this case into account as non-binding precedent.

Defendants request the Court take judicial notice of three declarations filed in support of the defendant/ counter-claimant Jasbir Tung's opposition to plaintiff BP West Coast Products LLC in the same case for which Plaintiff seeks judicial notice, *BP West Coast Products LLC v. Tung,* Case No. EDCV 02-1095-(VAP)(SGLx). Plaintiff objects to Defendants' request that the Court take judicial notice of these declarations.

A court may take judicial notice of facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.[1] Fed.R.Evid. 201(b). Judicial notice may be taken of court records. *Mullis v. U.S. Bankruptcy Court for Dist. of Nevada,* 828 F.2d 1385, 1388 n. 9 (9th Cir. 1987). Accordingly, a court may take judicial notice of the opinions, complaints, briefs, and evidence filed in other actions. *See Egan v. Teets,* 251 F.2d 571, 578 (9th Cir. 1957). However, "[a]s a general rule, a court may not take judicial notice of

[1] Fed.R.Evid. 201(b): "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it." *M/V American Queen v. San Diego Marine Const. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983).

Therefore, in resolving the motions before the Court, the Court will not take judicial notice of the court documents provided for the truth of the facts asserted therein. Rather, the Court will only consider these documents for the purpose of showing that various contentions and arguments have been raised in other actions and to review how other courts have addressed these issues. With these considerations in mind, the Court turns its attention to Plaintiff's motions.

IV. DISCUSSION

Plaintiff moves for summary judgment on its requests for declaratory relief that it did not violate the requirements of the PMPA in selling its interests in the facilities operated by the Defendants, and in nonrenewing the Defendants' franchise relationships. In support of its motion for summary judgment, Plaintiff contends that the undisputed facts show it did not violate the PMPA and it made its decision to sell the facilities in good faith and the ordinary course of business. Conversely, Defendants argue that there are substantial issues of material fact regarding whether Plaintiff's decisions to sell the facilities at issue were made in good faith and the normal course of business. Defendants further argue that these are issues of material fact sufficient to withstand the Defendant's summary judgment motion.

The PMPA governs relationships between franchisors and franchisees in the marketing of motor fuel and, accordingly, governs when an oil company may terminate a franchise relationship with a franchisee. *See* 15 U.S.C. §§ 2801-2806. The Ninth Circuit has recognized that the chief purpose of the PMPA is to remedy the disparities in bargaining power between franchisees and franchisors in order to protect the franchisee's reasonable expectation of continuing the franchise relationship. *Unocal Corp. v. Kaabipour,* 177 F.3d 755, 762 (9th Cir.1999), *cert. denied,* 528 U.S. 1061, 120 S.Ct. 614, 145 L.Ed.2d 509 (1999); *Chevron U.S.A., Inc. v. Lutz,* 271 F.Supp.2d 1196, 1200 (N.D.Cal.2003). However, the PMPA is not "a one-way statute, which should single-mindedly be construed to favor franchisee positions . . . " *Kaabipour,* 177 F.3d at 762-763. Moreover, in enacting the PMPA Congress recognized that franchisors need adequate flexibility so that they may "initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." S.Rep. No. 95-731, at 18-19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 877.

Accordingly, the Ninth Circuit has recognized that "[I]n an age of increasing corporate competition, the major firms must retain the freedom to seek greater economic efficiency through corporate reorganizations, mergers and acquisitions." *Unocal Corp.,* 177 F.3d at 762. This is particularly important because "[i]n a rapidly changing economy fixed preservation of business relationships may spell financial death to the detriment of franchisees as well as franchisors.'" *Id.* (internal quotes and citation omitted). In addition, when enacting the PMPA, Congress desired a single uniform set of rules governing the grounds

for termination and non-renewal of motor-fuel marketing franchises. *Id.*

Title 28 U.S.C. §2802 limits the situations in which a franchisor can decline to renew a franchise relationship. One ground for nonrenewal is if a franchisor in good faith and in the normal course of business decides to sell the premises. 15 U.S.C. §2802(b)(3)(D)(i)(III). There are, however, restrictions on termination under the PMPA if the termination is because the property is being sold. The franchisor's determination cannot be made for the "purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account." 15 U.S.C. §2802(b)(3)(D)(ii).

There are three conditions that restrict the franchisor's right to freely sell its facilities under the PMPA. First, the franchisor must determine to sell the facility at issue in good faith and in the normal course of business. Second, the franchisor must provide written notice to the franchisee of its intent to not renew a franchise relationship and provide the reasons therefor at least ninety days before the nonrenewal takes effect. 15 U.S.C. §§ 2804 & 2802(b)(3)(D)(iii). Third, the franchisor must make a "bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interest in such premises," or if applicable, offer "franchisee a right of first refusal of at lest 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises." 15 U.S.C. §2802(b)(3)(D)(iii).

A. Good Faith and Normal Course of Business

Title I of the PMPA regulates termination of petroleum franchises and specifies the grounds upon which

franchises may be terminated or not renewed. The purpose of the PMPA includes protecting a franchisee who has built up substantial goodwill in a station from having his or her franchise arbitrarily taken from him or her. A franchisee who is terminated or not renewed for causes not permissible under the PMPA can bring suit against the franchisor. 15 U.S.C. § 2805(a). As noted above, the PMPA requires that a franchisor make its decision to sell a facility "in good faith and the normal course of business." The PMPA's good faith requirement looks to whether a franchisor's decision was a "sham determination" used as an artifice to terminate or nonrenew a franchise. *Beck Oil Co. v. Texaco Refining & Marketing, Inc.*, 25 F.3d 559, 561-62 (7th Cir.1994); *Ajir v. Exxon Corp.*, 1995 WL 261411, *2 (N.D.Cal.1995). "The good faith requirement looks to whether the franchisor's actions are designed to conceal selective discrimination against individual franchises." *Kaabipour*, 177 F.3d at 767.

When determining whether a decision is in good faith, a court must keep in mind that Congress did not intend "judicial second-guessing of the economic decisions of franchisors." *Svela v. Union Oil Co. of Calif.*, 807 F.2d 1494, 1501 (9th Cir.1987). A court is not to review the objective reasonableness of the franchisor's actions or substitute the court's judgment for that of the franchisor in deciding whether to sell a facility. *Coast Village, Inc. v. Equilon Enterprises, LLC*, 163 F.Supp.2d 1138, 1175 (C.D.Cal.2001). The test for determining good faith is subjective, and the court looks to the franchisor's intent rather than the effect of the franchisor's actions. *Svela*, 807 F.2d at 1501. In determining a franchisor's motive, the court may only review the franchisor's process and proven motive in deciding to sell the facility. *See Coast Village*,

Inc. v. Equilon Enterprises, LLC, 163 F.Supp.2d 1136, 1175 (C.D.Cal.2001). As long as the franchisor did not have discriminatory motive and there is no evidence the reasons given for nonrenewal are a pretext disguising an improper purpose, the court should find good faith. *Kaabipour,* 177 F.3d at 767; *Beck Oil,* 25 F.3d at 562; *Massey v. Exxon Corp.,* 942 F.2d 340, 344 (6th Cir.1991).

A franchisor meets the "normal course of business" requirement if its determination to sell was the result of the franchisor's normal decision making process. *Beck Oil,* 25 F.3d at 562; *Sandlin v. Texaco Refining and Marketing, Inc.,* 900 F.2d 1479, 1481 (10th Cir.1990) ("While Congress intended the good faith test to prevent franchisors from shielding their decisions with artifice, the normal course of business element examines whether the franchisor made the choice through its usual decision-making process.").

In this case, the Court finds no disputed issue of fact regarding whether Plaintiff's decisions to sell the facilities were made in good faith and in the normal course of business. Plaintiff has provided substantial evidence that Plaintiff made the decision to sell the facilities as part of its annual evaluation of where its capital could best be employed as well as the performance of its retail gasoline station facilities in the markets where they operate. (Malasavage Decl. ¶¶ 2-7). In performing these evaluations, Plaintiff considered numerous factors in accordance with its overall business strategy. Thereafter, Plaintiff's management identified the markets and locations where it should seek to recover its capital investments by selling its interests in the corresponding facilities. (Malasavage Decl. ¶¶ 6-7). As previously noted "[t]he good faith requirement looks to whether the franchisor's actions are designed to conceal selective discrimination against individual

franchises." *Kaabipour,* 177 F.3d at 767. The consolidated cases in this matter arise out of the Plaintiff's decision to sell approximately fifty facilities as a result of its annual evaluation. While the Plaintiff's decision to sell numerous facilities is not determinative on this issue, it weighs heavily in the Plaintiff's favor. Plaintiff's decision to sell a large number of unrelated facilities hardly bespeaks of selective discrimination.

While the franchisor bears the burden of showing that its decision not to renew the franchise relationship is permitted under the PMPA, the franchisee, in opposing summary judgment, must present evidence that the franchisor's decision is a sham, pretextual, or discriminatory, and was not made in the normal course of business. *See Svela,* 807 F.2d at 1501, *Ajir,* 1995 WL 261411, *2 (citing *Marks v. Shell Oil Co.,* 643 F.Supp 1050 1055 (E.D. Mich. 1986), *vacated on other grounds,* 830 F.2d 68 (6th Cir. 1987)). As the Plaintiff has met its initial burden, the Defendants must now present evidence that Plaintiff's decision was a sham, pretextual, or discriminatory.

Defendants do not specifically dispute Plaintiff's evidence. However, Defendants do argue that Plaintiff's decisions to sell the facilities were not made in good faith and the normal course of business. According to the Defendants, this is because Plaintiff used the NRC bid process to increase the ROFR purchase prices to Defendants by forcing them to bid on the business goodwill over and above the value of the real property, improvements and equipment.

In support of this, the Defendants argue that genuine issues of material fact exist as to whether Plaintiff's bidding scheme through the NRC process was conceived

and conducted in good faith and the normal course of business. More specifically, the Defendants argue that the third-party offers were inflated because the Plaintiff provided the bidders with fuel sales and volumes as included in the bidding package indicating a requirement that the third party enter into a fifteen year ARCO/am/pm franchise agreement. Thus, Defendants argue that the third parties would not have offered as much to purchase the facilities without the ARCO/am/pm franchises.

Defendants rely on *Ellis* for the proposition that the franchisor's interest does not include the value of the franchisee's own goodwill. In this regard, Defendants are correct. *See Ellis v. Mobil Oil,* 969 F.2d 784, 788 (9th Cir. 1992). Moreover, Defendants provide the declarations of the two third-party bidders, in which both state that they factored goodwill in their bids for the respective facilities due to the fact that they were going to receive fifteen-year supply agreements for ARCO-branded gasoline. (See, Honein Decl. ¶¶ 10, 11, 12, and Badru Khan Decl. ¶¶ 6-7). Thus, Defendants argue that because Plaintiff's bidding scheme through NRC ensured that as part of the overall bids, the third-party bidders included the monetary value of the franchisees' own business goodwill, Plaintiff was offering Defendants' goodwill, which was not Plaintiff's to sell.

Plaintiff, on the other hand, argues that Defendants' reliance on *Ellis* is misplaced since the court in that case limited its holding to "bona fide" offers to purchase facilities and not, as in this case, to ROFR offers from third parties. *Ellis,* 969 F.2d at 785-86 (Where "a third party's offer is in the form of a single transaction for cash, the court can justifiably infer that the amount of an arms'

length offer represents the value of the station."). The Court agrees with the Plaintiff's interpretation of *Ellis*.

Defendants point to the declarations of the third-party bidders as evidence they included the goodwill in their bids. While these declarations may appear to support the Defendants' position, there is a question whether the goodwill was exclusive to the Defendants. As the Plaintiff points out, as a factual matter any goodwill the Defendants possessed in their franchises was lost at the end of their franchise terms. The evidence suggests that the third-party bidders increased their bid amounts because they were going to be entering into long term franchise agreements with the Plaintiff if they were successful bidders. They increased their bid amounts because they would be purchasing ARCO/am/pm branded facilities. There is no evidence that they increased their bid amounts because the facilities had been operated by the Defendants. Thus, the third-party declarations are not sufficient support for an inference that the bidders offered a higher price for the facilities because they included the value of Defendants' goodwill in the purchase price. Most importantly, a goodwill theory is not a recognized basis to vitiate or reform a sale. *Lee v. Exxon*, 867 F.Supp. 365, 368 (D.S.C.1994); *Greene*, 318 F.Supp.2d 987 (E.D.Cal.2004).

Additionally, the Court agrees with and adopts the position of the *Greene* court on this issue, i.e., even if Defendants are correct and Plaintiff's motive was based in part to obtain money from an immediate sale and to continue receiving money in the future from the franchises, the Court does not find this to be an improper motive made in bad faith. *Id.* at 996. As in *Greene*, the Defendants here cite no law to support the proposition

that a decision made for a franchisor's financial gain is in bad faith or not in the normal course of business.

In arguing Plaintiff's decision to sell was not in good faith and the normal course of business, Defendants take exception with the bidding system employed by Plaintiff. Defendants argue that "it is not enough that [Plaintiff's] decision to sell [Defendants'] premises by including [them] in the NRC bidding scheme be in good faith and in the normal course of business. The system set up by [Plaintiff] to carry out such sale must be in good faith and in the normal course of business as well." Opp. at 7. As in *Greene*, Defendants cite no relevant support for this proposition. Defendants maintain that this proposition is supported by *Valentine v. Mobile Oil Corp.*, 789 F.2d 1388 (9th Cir. 1986). However, *Valentine* dealt with the issue of whether a franchisor was required to make a bona fide offer to sell the station to the franchisee as a condition to materially alter the premises.

On this issue, the *Greene* court found that "absent a requirement that the court must also review the bidding process in determining good faith and in the normal course of business, the court is not inclined to add this requirement." *Greene*, 318 F.Supp.2d at 996. Section 2802(b)(3)(D) only requires that the "determination" to sell a facility be "made by the franchisor in good faith and in the normal course of business."

The Defendants have not provided the Court with any evidence regarding bad faith involved in Plaintiff's determination to sell the facilities. The *Greene* court found, under very similar facts, that any evidence regarding impropriety in the bidding process was at best circumstantial evidence that the franchisor's underlying decision to

sell the facilities was not in good faith and in the normal course of business. *Greene*, 318 F.Supp.2d at 996. Likewise, in the present case the Defendants have failed to provide sufficient evidence of irregularities regarding the sale of the facilities to support an inference that the underlying decision to sell was in bad faith.

The PMPA clearly allows for facilities to be sold through a procedure such as the NRC. *Id.* at 996. The only allegations of impropriety by Plaintiff for which Defendants have evidence is that: 1) Plaintiff provided potential bidders with the volumes and sales history for the facilities, 2) the third-party bidder interested in purchasing Defendant Ghumman's franchise facility was not a willing and able buyer, and 3) a third-party bidder violated Plaintiff's own rules prohibiting third-party bidders from having direct contact with franchisees under penalty of disqualification.

Defendants' allegation that Plaintiff provided potential bidders with the volumes and sales history for the facilities does not show bad faith. The volumes and sales history were given as part of the bidding process. Although this information is generally considered confidential by Plaintiff, the information was provided to bidders to help them value the businesses. The Court agrees that providing this information may have given the bidders an incentive to bid high on facilities that were profitable. However, Defendants fail to provide any authority making Plaintiff's conduct illegal or improper. Likewise, this Court finds that there is no evidence in this case that the

Plaintiff's business decision to provide this information was inappropriate or somehow contravened the PMPA.[2]

Defendants' next contention is that there is an issue of material fact regarding whether the third-party offers to purchase the Ghumman franchise facility was a sham because the high bidder [was not a ready, willing and able buyer. More specifically, Defendants point out that Badru Khan, a bidder on Ghumman's franchise facility, had not applied for a loan at the time of his bid. That the bidder on Ghumman's franchise facility was allegedly not a willing and able buyer, does not show any bad faith on the part of Plaintiff in this sale. First, there is no evidence that the bidder was not a legitimate third-party bidder who was in a financial position to pay the offer price if Defendant Ghumman declined the right of first refusal. Second, there is no evidence that the third-party bidder did not make the required initial bid deposit of 2.5% of the bid price included with the bid. Likewise, there is no evidence that the third-party bidder did not make the additional 7.5% earnest money requirement on the successful bid. Third, Plaintiff's "Sealed-Bid Real Estate Sale Agreement" provided third-party bidder Badru Khan ninety (90) days from escrow opening to secure a loan. Thus, although the third-party bidder failed to pre-qualify there has been no showing pre-qualification was required or that it was

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[2] The *Greene* court noted that it "would presume bidders would want this information when bidding to know an appropriate bid." *Greene*, 318 F.Supp.2d at 997. This Court agrees that it would be difficult to imagine a third-party bidder willing to place a bid upwards of a half-million dollars on an uninformed basis. In fact, the declarations of the third-party bidders state that they believed the "volumes and merchandise sold at the station were good and considered it to be a profitable business." Decl. Badru Khan at 1.

unlikely that the bidder would have qualified in a timely manner. Finally, Plaintiff reserved the right in its sole discretion "to overlook minor inconsistencies or nonconformance in any bid" and "to accept the bid that [Plaintiff] considers in its best interest, wether [sic] or not it is the highest purchase price."

Defendants' final contention is that Plaintiff did not disqualify a third-party bidder who violated Plaintiff's own rules prohibiting third-party bidders from having direct contact with franchisees. Defendants contend that Plaintiff forgave a violation of Mr. Khan, a bidder on the Ghumman facility, who contacted the franchisee or employees thereof. Again, however, Plaintiff reserved the right in its bidding procedure "to overlook minor inconsistencies or nonconformance in any bid."

In the present case, Plaintiff has produced evidence that it made a determination in good faith and in the normal course of business to sell the premises. *See* 15 U.S.C. § 2802(b)(3)(D)(iii). Franchisees can only avoid summary judgment if they show that this reason was actually a sham. Defendants have not made such a showing and rely solely on the Plaintiff's alleged conduct in selling the facilities. However, this Court will not second-guess the wisdom of the franchisor's decision. *Svela*, 807 at 1501.

In sum, the Plaintiff franchisor did not have discriminatory motive and there is no evidence the reasons given for the sale of the facilities were a sham, pretext disguising an improper purpose, or discriminatory in any way. Thus, the Court finds the Plaintiff's decision to sell the facilities was not made in bad faith. *Kaabipour*, 177 F.3d at 767; *Beck Oil*, 25 F.3d at 562; *Massey*, 942 at 344.

B. Notice

The PMPA requires a franchisor to notify an existing franchisee that a franchise will not be renewed at least ninety days before the nonrenewal takes effect. *See* 15 U.S.C. § 2902. Such notice shall be in writing and "shall be posted by certified mail or personally delivered to the franchisee." 15 U.S.C. § 2902(b)(1) & (2). The Notice must contain "a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor." 15 U.S.C. § 2902(b)(3)(A). Plaintiff has provided evidence that on or about April 22, 2002, Plaintiff notified Defendants that it was considering selling its interest in the facilities and nonrenewing the parties' lease franchise relationships. On or about July 31, 2002, Plaintiff notified Defendant May that it had decided to sell the facility and nonrenew the franchise relationship, seven months before the expiration of May's franchise relationship. On or about July 31, 2002, Plaintiff notified Defendant Ghumman that it had decided to sell the facility and nonrenew the franchise relationship, almost two years before the expiration of Ghumman's franchise relationship. The separate notices informed each Defendant that their respective franchise would not be renewed because Plaintiff "had determined in good faith and in the normal course of business to sell the marketing premises."

Defendants do not dispute the timeliness of the notices from Plaintiff. In fact, Defendants acknowledge to having received the notices on a timely basis. Defendants further acknowledge that the notices "parroted the language of the PMPA." However, Defendants claim the notices did not provide sufficient reasons for the termination. The Court disagrees with the Defendants' and finds

that the notices clearly indicated that the franchises were not being renewed due to Plaintiff's decision to sell the respective premises. Defendants were informed of their rights to purchase the facilities. The notices were timely and concise. The Court finds they were sufficient to have provided Defendants with the reason for the nonrenewal.

Defendants also argue that the notices falsely stated that Plaintiff did not intend to renew the franchises. Defendants argue that in reality, once the facilities had been sold, Plaintiff did renew the franchise relationships. Thus, according to Defendants, the Plaintiff never intended to nonrenew the franchises. The Court finds no merit to this argument. There is no evidence that at the time Plaintiff sent the notices, Plaintiff was in fact planning to renew the franchises. This argument is a logical impossibility and, simply put, the argument refutes itself. In the instant case, the Plaintiff determined to sell the facilities and attempted to do so through the NRC process. Plaintiff could not both intend to renew Defendants' franchises and also sell the facilities through the NRC process because the facilities may have been sold to another buyer.

The Defendants were also informed regarding their rights to purchase the facilities and of the terms under which Plaintiff would grant new franchises. Finally, the original franchise relationships Defendants had with Plaintiff did in fact terminate. Defendants now have contract-dealer franchises instead of franchises as lessees of the stations. While in practical terms the two types of franchises may be similar, Defendants have not shown a disputed issue of material fact that at the time Plaintiff sent the notices Plaintiff actually intended to renew Defendants' old franchise agreements. In sum,

the Defendants' argument is unpersuasive regarding the inadequacy of the notice provided by Plaintiff. Plaintiff's timely notices of nonrenewal provided the Defendants with information sufficient for them to verify whether Plaintiff's nonrenewal rested on grounds permissible under the PMPA. The PMPA does not require more than that. *See Svela*, 807 F.2d at 1498; *Southern Nev. Shell Dealers Ass'n*, 634 F.Supp at 68. Thus Plaintiff has satisfied the PMPA's second requirement as a matter of law. *See* Fed. R. Civ. P. 56(c).

C. Bona Fide Offer or Right of First Refusal

Before selling a facility, a franchisor must give the franchisee an opportunity to purchase the subject facility. 15 U.S.C. § 2902(b)(3)(D)(iii). Section 2902(b)(3)(D)(iii) provides that in the case of a leased marketing premises, the franchisor must "either – (I) [make] a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or (II) if applicable, [offer] the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises." In this case, Plaintiff followed the second option and offered Defendants the right of first refusal to purchase the facilities. Defendants appear to contend, however, that the third party offers were not valid third-party offers because of various improper conduct that allegedly occurred during the bidding process.

As noted above, Defendants contention is that the third-party purchase prices were inflated by the bidding process. Defendants cite to the evidence showing Plaintiff provided confidential sales information. As discussed

above, the Court does not find that providing this information was improper. While Plaintiff considered the information confidential, Defendants have cited no authority for the proposition it was inappropriate for Plaintiff to provide this information to bidders. The Court finds nothing in the PMPA that prohibits a third party from receiving information about potential future profits. *Greene*, 318 F.Supp.2d at 998.

Defendants also contend they were required to pay for more than the fair market value of the facilities because the third-party bids included other arrangements. Defendants provide evidence from appraisers who appraised the respective facilities at less than the purchase prices. Defendants take the position that they should not have had to pay the third-party purchase prices because Plaintiff had offered to enter into an ARCO/am/pm franchise with the third parties if they purchased the individual facilities. In other words, Defendants claim the purchase prices of the facilities were inflated because they included the promise to enter into an ARCO/am/pm franchise agreement in the future. Defendants argue that without the promise of the franchises, the third-party bidders would not have bid as much as they did. Defendants have provided declarations of the bidders to support this argument. However, the Court finds the Defendants' argument without merit. Likewise, the *Greene* court found that a third-party bid that may have included a promise or understanding that the third party would be given a franchise in the future does not mean that the third-party bid violates the PMPA. *Id.* at 998.

"[B]idders routinely come to the table with different hands." *Keener v. Exxon Company, U.S.A.*, 32 F.3d 127, 132 (4th Cir. 1994). "A prospective buyer who does not

currently have a franchise would come to the table with different needs than a prospective buyer who already has a franchise and is currently leasing a facility for sale." *Greene*, 318 F.Supp.2d at 998. This does not, however, make the third-party bidders' offers for the facilities any less legitimate. *Id.* "An actual price, agreed to by a willing buyer and a willing seller, is the most accurate gauge of the value the market places on a good." *Keener*, 32 F.3d at 132. The purchase price is a measure of what the station is worth to a purchaser in the third party's position. The Court can infer that such an amount represents the value of the facility. *Ellis*, 969 F.2d at 786. Furthermore, the presumption of validity to third-party bids "comports with the desire not to transform a simple statutory requirement into a complex and cumbersome one necessitating a detailed economic analysis of private sector decisions." *Keener*, 32 F.3d at 131 (In *Keener*, the Fourth Circuit Court of Appeals reviewed the propriety under the PMPA of a franchisor's non-renewal of a franchise and offer to sell the facility at the same price bid by a third party).

Here, Plaintiff argues that the fact it and the third parties would enter into new franchise relationships "after" the Defendants' own franchises agreements had expired does not have any relation to wether [sic] Plaintiff complied with the PMPA. The Plaintiff cites *Lee*, 867 F.Supp. 365, to support its argument. The plaintiff in *Lee* purchased the franchise facility after the defendant had received a bid from a third party and provided the plaintiff with his right of first refusal. *Id.* at 366. The plaintiff in *Lee* sought to reform the sale alleging that the franchisor had sold goodwill belonging to him because the third party's bid was higher than what the plaintiff believed was the market value for the facility. *Id.* at 368. The court

disagreed and found that not only had the plaintiff failed to provide any evidence to support his claim that goodwill attached to the premises, but a goodwill theory is not a recognized basis to vitiate or reform a sale. *Id.* at 368.

Finally, Defendants argue that they are entitled to bona fide fair market value offers under *Ellis*, 969 F.2d 784 (9th Cir. 1992). Defendants argument under *Ellis* is that the remedy for Plaintiff's alleged failure to comply with the PMPA in the instant case should be that Plaintiff comply with the "bona fide offer" requirement, rather than the right of first refusal requirement. Defendants rely on *Ellis*, for the proposition that a third party offer that includes other factors is not allowed by Section 2802(b)(3)(D)(iii)(II), and in such a circumstance, a bona fide offer must be given. Contrary to Defendants's position, The Ninth Circuit did not find the third-party offer in *Ellis* invalid because it included the value of "independent components." Rather, the court refused to allow the third-party offer because the offer involved multiple facilities and it was impossible to determine the value of any one of them. In any event, the Court finds that *Ellis* is inapplicable to the present case because the offers made in the present case were for individual facilities.

The evidence presented in this case confirms that Plaintiff exercised its right to sell the facilities on a good faith business decision and in the normal course of business. The undisputed evidence shows that Plaintiff's written offer complied with the requirements of 15 U.S.C. § 2802(b)(3)(D)(iii). The offer which Defendants accepted was the same offer extended to Plaintiff by third-party bidders operating under normal market forces. As the *Keener* court observed, "An actual price, agreed to by a willing buyer and a willing seller, is the most accurate

gauge of the value the market places on a good. Until such an exchange occurs, the market value of an item is necessarily speculative." *Keener*, 32 F.3d at 132. Defendants have failed to come forward with evidence sufficient to overcome the statutory presumption as to the propriety of this transaction. A franchisee only has "the right to match" the terms of the contract between the franchisor and the prospective buyer. The franchisees are not entitled to any "special price discounts." *Ballis v. Mobil Oil Corp.*, 622 F.Supp. 473, 475 (D.C.Ill.1985). Defendants were afforded that opportunity here and they accepted, albeit under protest. The Court finds that the right of first refusal presented to the Defendants satisfied the requirements under the PMPA. Accordingly, the Court finds summary judgment in favor of Plaintiff appropriate on the PMPA claims.

V. CONCLUSION

Plaintiff has met its burden on summary judgment and it has demonstrated that it made its decision to sell in good faith and the normal course of business, that its notice was timely, and that it offered Defendants an opportunity to purchase the facilities on the same terms as the third parties. Defendants have not met their burden, and have not made a showing that there is any genuine issue of material fact to be resolved by a trier of fact. The Court finds that Plaintiff did not violate the PMPA in these cases. The Defendants' counterclaims under the PMPA are dismissed accordingly.

ACCORDINGLY, IT IS HEREBY ORDERED that the Plaintiff's Motions for Summary Judgment in these

declaratory relief actions (Docket Nos. 56 & 57) are **GRANTED**.

IT IS SO ORDERED

DATED: This 2nd day of December 2004.

/s/ [Illegible]
LARRY R. HICKS
United States District
Judge

2006 WL 1194439

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BP WEST COAST PRODUCTS LLC, a Delaware limited liability company Plaintiff – counter-defendant – Appellee v. JASBIR S. TUNG, an individual dba Tung ARCO AM/PM Defendant – counter-claimant – Appellant	No. 04-55491 D.C. No. CV-02-01095-VAP MEMORANDUM* (Filed May 4, 2006)

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted December 8, 2005
Pasadena, California

Before: PREGERSON, COWEN,** and THOMAS, Circuit Judges.

On May 1, 2006, we filed a published opinion in *B.P. West Coast Products LLC v. May*, No. 05-15076. The issues

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

raised in this matter are substantially adjudicated in that case, and for the reasons set forth therein, the order of the district court in this matter will be affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BP WEST COAST PRODUCTS LLC, a Delaware limited liability company Plaintiff – counter-defendant – Appellee, V. JASBIR S. TUNG, an individual dba Tung ARCO AM/PM, Defendant – counter-claimant – Appellant.	No. 04-55491 D.C. No. CV-02-01095-VAP **JUDGMENT**

Appeal from the United States District Court for the Central District of California, Riverside.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Riverside and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 05/04/06

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BP WEST COAST PRODUCTS LLC, a Delaware limited liability company, Plaintiff, v JASBIR S TUNG, an individual, Defendant	Case No EDCV 02-1095-VAP (SGLx) Consolidated with EDCV 03-767-VAP (SGLx) **JUDGMENT GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON PMPA CLAIMS AND PLAINTIFF'S MOTION TO DISMISS STATE LAW COUNTERCLAIM**

(Filed Feb. 13, 2004)

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD

Pursuant to the Order filed herewith, IT IS ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment on the PMPA claims is GRANTED, and Plaintiff's Motion to Dismiss Defendant's state law counterclaim is GRANTED without prejudice to Defendant's pursuit of that claim in state court The Court orders that such judgment be entered

Dated: February 13, 2004 /s/ Virginia A. Phillips
VIRGINIA A PHILLIPS
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BP WEST COAST PRODUCTS LLC, a Delaware limited liability Company, Plaintiff, v JASBIR S. TUNG, an individual, Defendant	Case No EDCV 02-1095-VAP (SGLx) Consolidated with EDCV 03-767-VAP (SGLx) **[Motion filed on January 5, 2004.]** **ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON PMPA CLAIMS AND PLAINTIFF'S MOTION TO DISMISS STATE LAW COUNTERCLAIM** (Filed Feb. 13, 2004)

The Court has received and considered all papers filed in support of, and in opposition to, the Motion for Summary Judgment and the Motion to Dismiss, as well as the arguments advanced by counsel at the hearing For the reasons set forth below, the Court GRANTS Plaintiff's Motion for Summary Judgment on the PMPA claims and GRANTS Plaintiff's Motion to Dismiss Defendant's state law counterclaim

I. BACKGROUND

A. STATEMENT OF FACTS[1]

BP West Coast Products LLC ("Plaintiff") owned the real property and improvements of an ARCO-branded facility and am/pm Mini Market located at 495 South Waterman Avenue, San Bernardino, California ("Facility") [Statement of Uncontroverted Facts and Conclusions of Law ("Facts") ¶ 1] In May 2000, Plaintiff and Jasbir S Tung ("Defendant") entered into two franchise agreements, an am/pm PMPA Franchise Agreement and an am/pm Mini Market Agreement, providing for the operation of both the Facility and an am/pm Mini Market on the Facility [Declaration of Richard Schott ("Schott Decl") ¶ 4, Exs A, B] The two franchise agreements were set to expire on June 1, 2003. [*Id* Exs A, B]

In 2001, Plaintiff evaluated a number of ARCO-branded, retail gasoline facilities, including Defendant's Facility, to determine the markets in which it should seek to recover its capital investments by selling its interests in the facilities. [Facts ¶ 3, Schott Decl. ¶¶ 5, 6, 7, Declaration of Metro Malasavage ("Malasavage Decl") ¶ 8] In evaluating these facilities, Plaintiff considered the following factors the number of existing ARCO-branded facilities in the area; traffic patterns around each facility, current and future demographics in the area, lot and am/pm Mini Market size, gasoline volume and am/pm Mini Market sales, potential for expansion of the facility, and potential for growth [Facts ¶ 3, Schott Decl ¶ 6, Malasavage Decl ¶ 6] Following its evaluation, Plaintiff decided that it was in the company's best interest to recover its investment in

[1] The following facts are undisputed unless otherwise noted

various facilities, including Defendant's [Facts ¶ 3; Schott Decl ¶¶ 6, 7; Malasavage Decl ¶¶ 8-10]

Plaintiff engaged a real estate marketing company, National Real Estate Clearinghouse, as its agent for the purpose of obtaining sealed bids for the facilities that it was offering for sale, including Defendant's Facility [Facts ¶ 7; Declaration of Evan Gladstone ("Gladstone Decl") ¶ 3, Malasavage Decl ¶ 11.] To participate in the sealed bidding process, potential buyers needed to pre-qualify by attending a How-To-Bid Seminar as well as an interview conducted by one of Plaintiff's representatives, and by filling out a How-To-Bid Financial and Experience Worksheet [Deposition of Evan Gladstone ("Gladstone Depo.") Ex. 535] A third party to this action attended the seminar, filled out the appropriate form, and submitted a bid for Defendant's Facility. [*Id* Ex. 545, Declaration of Surinder Pal Singh ("Singh Decl") ¶ 5][2]

Plaintiff and the third party executed a Sealed-Bid Real Estate Agreement for Defendant's Facility on July 29, 2002 [Gladstone Depo Ex 557 at 1] The Agreement explained that an existing franchisee currently operated an ARCO-branded retail gasoline station and am/pm Mini Market at the real estate owned by Plaintiff, and that, the buyer would take over operation of the station and the

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[2] The parties disagree whether the third party who bid on Defendant's Facility attended an interview with one of Plaintiff's representatives. Exhibit 545 to the Gladstone Deposition is a "RSM Interview Form" dated May 20, 2002 that lists the third party who bid on Defendant's Facility as a "no show". Exhibit A to the Declaration of Vicki Franze, however, is an "RSM Interview Form" also dated May 20, 2002 that summarizes an interview that took place between the third party in question and one of Plaintiff's representatives, Interviewer Dimashkie.

Mini Market once the existing franchise relationship expired. [*Id* Ex 557 at 1.] The Agreement also explained that Plaintiff owned only the land and improvements where Defendant's Facility was located, and thus, the real estate being offered for sale did not include "the improvements and equipment owned by the Franchisee or any inventory" [*Id* Ex 557 at 2-3] The purchase price, therefore, explicitly excluded "the inventory, improvements, and equipment owned by the Franchisee [and] the franchise fee under the Mini Market Agreement" [*Id* Ex. 557 at 3]

On July 31, 2002, Plaintiff notified Defendant, in writing, of its decisions to sell the Facility and not to renew the parties' franchise relationship upon the expiration of the franchise agreements on June 1, 2003 ("Notice of Non-renewal") [Facts ¶ 4, First Amended Complaint ("FAC") Ex A] The Notice of Non-renewal cited section 2802(b)(3)(D)(i)(III) of the Petroleum Marketing Practices Act ("PMPA"), and explained that the franchise agreements would not be renewed because "BPWCP ha[d] made a determination in good faith and in the normal course of business to sell the premises upon which the Facility [was] located "[FAC Ex A.] The Notice of Non-renewal also informed Defendant that Plaintiff would either (1) make a bona fide offer to sell Defendant its interests in the Facility or (2) offer him a right of first refusal to purchase the Facility if a third party made Plaintiff an offer [Facts ¶ 6.] A summary statement of the PMPA was enclosed with the Notice of Non-renewal. [*Id.*]

On July 29, 2002, a third party offered to purchase Plaintiff's interest in Defendant's Facility for $1 2 million and a one-percent buyer's premium of $12,000 [Facts ¶ 8, Gladstone Decl. ¶¶ 10, 11] As a result, on August 8, 2002, Plaintiff offered Defendant a right of first refusal to

purchase the Facility for $1 2 million, the amount offered by the third party [Facts ¶¶ 12, 13, FAC Ex. C]

B. PROCEDURAL HISTORY

On October 11, 2002, Plaintiff filed this action against Defendant seeking declaratory relief that it complied with its obligations under the PMPA and any state laws concerning the subject matter of the dispute, that were not preempted by the PMPA On March 20, 2003, Defendant filed a Counterclaim seeking damages and injunctive relief for violations of the PMPA, restitution and injunctive relief for unfair business practices in violation of California Business and Professions Code § 17200; and declaratory relief

On July 8, 2003, Plaintiff filed a second action against Defendant seeking declaratory and injunctive relief regarding Defendant's refusal both to vacate the Facility and to cease operation of the Facility under Plaintiff's trademarks, Case No. EDCV 03-0767. On July 28, 2003, the two cases were consolidated by stipulation

On August 4, 2003, the Court granted Plaintiff's Ex Parte Application for a Preliminary Injunction and ordered Defendant to vacate the Facility no later than August 15, 2003. On September 30, 2003, the parties entered into a Protective Order pursuant to Federal Rule of Civil Procedure 26

On January 5, 2004, Plaintiff filed a Motion for Summary Judgment on the PMPA claims, and a Motion to Dismiss Defendant's state law claim ("Mot"). On January 20, 2004, Defendant filed an Opposition ("Opp'n") On January 26, 2004, Plaintiff filed a Reply ("Reply").

II. UNCONTROVERTED FACTS, EVIDENTIARY OBJECTIONS, AND REQUESTS FOR JUDICIAL NOTICE

A. UNCONTROVERTED FACTS

Pursuant to Local Rule 56-1, Plaintiff submitted a Statement of Uncontroverted Facts on January 5, 2004 in conjunction with its Motion for Summary Judgment Under Local Rule 56-3

> In determining any motion for summary judgment, the Court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the "Statement of Genuine Issues" and (b) controverted by declaration or other written evidence filed in opposition to the motion

Local Rule 56-2 requires the opposing party to submit a response to each of the moving party's factual statements and to cite admissible evidence disputing them Defendant filed a Statement of Genuine Issues on January 20, 2004.

Defendant admits Uncontroverted Fact Number 6 This fact is admitted to exist without controversy and is hereby adopted by the Court Defendant disputes but does not successfully controvert Fact Numbers 1-5, 7, 8, 11, and 12 The Court, therefore, adopts these facts as uncontroverted The Court declines to adopt Fact Numbers 9, 10, and 13 because the facts are either conclusory, unsupported by the record, or immaterial to the Court's decision

B. EVIDENTIARY OBJECTIONS

The Court sustains Plaintiff's relevance objections to the declarations of Badru Kahn and Jerome Thissen as well as excerpts and exhibits of the Deposition of Evan Gladstone, attached as Exhibit A to the Declaration of Thomas P. Bleau, that pertain to Kahn and Thissen. [Gladstone Decl at 74 9-12, 80-17-25, 81 5-8, 84 13-17, 100-3-24, 108-3-6, 113 25-114 18, 214 3-25, 218 18-219 8, Exs 508, 537]

C. REQUESTS FOR JUDICIAL NOTICE

The parties request judicial notice of six documents [*See* Plaintiff's Request for Judicial Notice in Support of Its Motion Ex A; Defendant's/ Counter-Claimant's Request for Judicial Notice in Support of His Opposition Exs. 1, 2; and Plaintiff's Request for Judicial Notice in Support of Its Reply Exs A-C]

A judicially noticed fact must be one not subject to reasonable dispute In that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R Evid 201(b) A court may not take judicial notice of a fact that is "subject to reasonable dispute." *Id*

The parties have not filed any opposition to these requests. More Importantly, the parties' exhibits are all judicial filings and court documents, the existence of which may be judicially noticed The requests are granted

III. LEGAL STANDARD

A motion for summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law Fed R Civ P 56(c), *Anderson v Liberty Lobby, Inc,* 477 U.S 242, 247-48 (1986) The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict" *Anderson,* 477 US. at 250

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment *Margolis v Ryan,* 140 F 3d 850, 852 (9th Cir 1998), *Retail Clerks Union Local 648 v Hub Pharmacy, Inc,* 707 F 2d 1030, 1033 (9th Cir 1983) The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact *Celotex Corp. v Catrett,* 477 U.S 317, 323 (1986)

In addition, where the moving party has the burden at trial, "that party must support its motion with credible evidence . . . that would entitle it to a directed verdict if not controverted at trial" *Celotex,* 477 U S at 331 The burden then shifts to the non-moving party "and requires that party . . . to produce evidentiary materials that demonstrate the existence of a 'genuine issue' for trial . . . " *Id, Anderson,* 477 U S at 256, Fed R. Civ. P. 56(e)

Where the non-moving party has the burden at trial, however, the moving party need not produce evidence negating or disproving every essential element of the non-moving party's case *Celotex,* 477 U S at 325 Instead, the moving party's burden is met by pointing out that there is an absence of evidence supporting the non-moving party's case *Id* The burden then shifts to the non-moving party to

show that there is a genuine issue of material fact that must be resolved at trial Fed R. Civ P 56(e), *Celotex,* 477 U S at 324, *Anderson,* 477 U.S at 256. The non-moving party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial *Celotex,* 477 U S at 322; *Anderson,* 477 U S. at 252.

A genuine issue of material fact will exist "if the evidence is such that a reasonable jury could return a verdict for the non-moving party" *Anderson,* 477 U S. at 248 In ruling on a motion for summary judgment, the Court construes the evidence in the light most favorable to the non-moving party. *Barlow v Ground,* 943 F 2d 1132, 1135 (9th Cir 1991), *T W Electrical Serv Inc v Pacific Elec Contractors Ass'n,* 809 F 2d 626, 630-31 (9th Cir 1987)

IV. DISCUSSION

"The PMPA remedied what Congress perceived as a disparity in bargaining power between oil companies and their retail service station franchisees," *Sutton v Atlantic Richfield Co,* 539 F Supp 658, 658 (C D Cal 1982), by creating "a single, uniform set of rules governing the grounds for non-renewal of motor fuel marketing franchises and the notice which franchisors must provide franchisees prior to non-renewal of a franchise relationship "*Unocal Corp v Kaabipour,* 177 F.3d 755, 762 (9th Cir 1999) (citing S Rep No 95-731, at 18-19 (1978), *reprinted in* 1978 U S C C A N 873, 877))

"A product of compromise, the PMPA affords franchisees important but limited procedural rights, while allowing franchisors significant latitude in responding to changing market conditions" *Valentine v Mobil Oil Corp,*

789 F.2d 1388, 1390 (9th Cir. 1986) In enacting the PMPA, Congress "affirmatively declined to give franchisees more elaborate protections because of concern that this might unduly interfere with the franchisors' property rights, possibly amounting to an unconstitutional taking" *Id* at 1391; *Kaabipour,* 177 F.3d at 765.

Thus, while the "overriding purpose" of the PMPA "is to protect the franchisee's reasonable expectation of continuing the franchise relationship," it also seeks to provide "adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences" *Kaabipour,* 177 F.3d at 762 (quoting *Ellis v Mobil Oil,* 969 F.2d 784, 788 (9th Cir 1992), S Rep No 95-731, at 18-19)

Under the PMPA, a franchisor may decline to renew a franchise relationship in order to sell the premises if (1) the franchisor's decision to sell the premises is made in good faith and in the normal course of business, 15 U.S.C. § 2802(b)(3)(D); (2) the franchisor provides the franchisee with timely and sufficient notice of its decision to sell the premises, 15 U S C §§ 2802(b)(3)(D)(iii) & 2804, and (3) the franchisor either (a) makes a bona fide offer to sell to the franchisee the franchisor's interests in the premises or (b) if applicable, offers the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase the franchisor's interest in the premises, 15 U.S C § 2802(b)(3)(D)(iii)(I & II)

A. DECISION TO SELL THE PREMISES

The PMPA requires that a franchisor make its determination to sell its premises "in good faith and in the

normal course of business." 15 U S C § 2802(b)(3)(D). "These requirements preclude judicial second-guessing of the economic decisions of franchisors" *Svela v Union Oil Co of Cal,* 807 F 2d 1494, 1501 (9th Cir 1987) ("The legislation was intended to provide franchisors with the flexibility to respond to changing market conditions and consumer preferences")

A franchisor's decision is made in "good faith" if it is not a "sham determination[] used as an artifice for . . . nonrenewal." *Ajir v. Exxon Corp,* 1995 WL 261411, *2 (N D Cal. May 2, 1995) (quoting *Beck Oil Co v. Texaco Ref & Mktg, Inc,* 25 F 3d 559, 561-62 (7th Cir 1994)), *Southern Nev Shell Dealers Ass'n v Shell Oil Co,* 634 F Supp 65, 69 (N D Nev 1985) (citing S Rep. No 95-731, at 37, *reprinted in* 1978 U.S C C A.N 873, 895-96) "So long as the franchisor does not have a discriminatory motive or use the [sale] as a pretext to avoid renewal, the franchisor has met the burden required by the PMPA for determining good faith" *Svela,* 807 F 2d at 1501 (internal quotations omitted); *Ajir,* 1995 WL 261411, *2 (citing *Massey v Exxon Corp,* 942 F 2d 340, 344 (6th Cir 1991)).

A franchisor's decision is made in "the normal course of business" if it is "the result of the franchisor's normal decisionmaking process" *Ajir,* 1995 WL 261411, *2 (quoting *Beck Oil Co,* 25 F 3d at 561-62), *Southern Nev Shell Dealers Ass'n,* 634 F Supp at 69 (citing S. Rep No. 95-731, at 37)

While the franchisor bears the burden of proving that its decision not to renew the franchise relationship is permitted under the PMPA, the franchisee, in opposing a motion for summary judgment, must present evidence that the franchisor's decision is a sham, pretextual, or

discriminatory, and was not made in the normal course of business. *See Svela,* 807 F 2d at 1501, *Ajir,* 1995 WL 261411, *2 (citing *Marks v Shell Oil Co,* 643 F Supp 1050, 1055 (E D Mich. 1986), *vacated on other grounds,* 830 F 2d 68 (6th Cir 1987)) (no genuine issue where franchisor considered uniform criteria in deciding which stations should be sold and franchisee failed to come forward with any admissible evidence to rebut franchisor's affirmative defense), *Kim v Mobil Oil Corp.,* 1986 WL 15779, *17 (C.D Cal July 16, 1986) (no genuine issue that franchisor's decision to sell premises was made in good faith and in normal course of business where, during periodical review of sales potential, franchisor considered objective criteria, such as level of gasoline sales at stations during preceding year, historical sales volumes, potential of stations for gasoline sales, location of service stations, traffic patterns around stations, and manner in which stations fit within company's long-term plans)

Plaintiff offers evidence that it made a determination in good faith and in the normal course of business to sell the premises where Defendant's Facility was located. In conducting an annual review, Plaintiff evaluated numerous ARCO-branded facilities, including Defendant's, to determine the markets in which it should invest more capital, and those in which it should seek to recover its investments [Facts ¶ 3; Schott Decl ¶¶ 5, 6, 7, Malasavage Decl ¶ 8] Plaintiff considered various economic, financial, and competitive criteria as part of this evaluation, including the number of existing ARCO-branded facilities in the area, traffic patterns around the facility, current and future demographics in the area, lot and am/pm Mini Market size, gasoline volume and am/pm Mini Market sales, potential for expansion of the facility; and potential

for growth [Facts ¶ 3, Schott Decl ¶ 6; Malasavage Decl ¶ 6] After considering these factors, Plaintiff identified Defendant's Facility as one of many that should be sold in the best interests of the company [Facts ¶ 3, Schott Decl ¶ 6, Malasavage Decl. ¶ 6] Plaintiff, then, has shown that it made an economic decision to sell Defendant's premises after considering appropriate criteria, a decision that the Court cannot second-guess *See Svela,* 807 F.2d at 1501, *Ajir,* 1995 WL 261411, *2-3, *Kim,* 1986 WL 15779, *17.

As Plaintiff has met its initial burden on summary judgment, Defendant must present evidence that Plaintiff's decision was a sham, pretextual, or discriminatory, and was not made in the normal course of business *See Ajir,* 1995 WL 261411, *2, *Svela,* 807 F 2d at 1501 To meet this burden, Defendant relies on (evidence relating only to Plaintiff's conduct in selling Defendant's Facility. [Opp'n at 7-9] Such evidence is relevant to whether Plaintiff made a bona fide offer to sell its interests in the premises to Defendant, it is not relevant to whether Plaintiff's decision to sell the premises was made in good faith and in the normal course of business *See Ajir,* 1995 WL 261411, *4-5 (concluding that there was no relationship between issues of whether decision to sell premises was made in good faith and in normal course of business and whether offer to sell was bona fide); *Sandlin v. Texaco Ref & Mktg, Inc,* 900 F 2d 1479, 1481-83 (10th Cir 1990) (explaining that "care must be taken not to use the evidence relevant to [the good faith and normal course of business] test as evidence applicable to the [bona fide offer test]") Defendant presents no evidence that Plaintiff's decision to sell the premises was discriminatory and not made in the normal course of business, thus, he has failed to satisfy his resulting burden *See Ajir,* 1995 WL 261411, *2-3 Plaintiff

has complied with the PMPA's first requirement as a matter of law *See* Fed R Civ P. 56(c), *Anderson,* 477 U S at 247-48.

B. NOTICE OF NON-RENEWAL

The PMPA requires that a franchisor give notice to a franchisee, in writing, of its intention not to renew a franchise relationship and the reasons for such non-renewal at least ninety days before the non-renewal takes effect 15 U.S C §§ 2802(b)(3)(D)(iii) & 2804(c), *Svela,* 807 F 2d at 1498 The reasons cited for non-renewal "must be specific enough for the franchisee to determine whether non[-]renewal rests on lawful grounds" *Svela,* 807 F 2d at 1498 (notice sufficient where franchisor stated station was uneconomical and franchisee knew franchisor was concerned with his low sales), *Southern Nev Shell Dealers Ass'n,* 634 F Supp at 68 (notice sufficient where franchisor stated that it was withdrawing from market and that withdrawal constituted ground for non-renewal under PMPA) Furthermore, a franchisor must enclose a summary statement of the PMPA along with its notice of non-renewal so that a franchisee can verify a franchisor's compliance with the PMPA 15 U.S C § 2804(c)(3)(C)

The uncontroverted evidence demonstrates that, on July 31, 2002, more than ten months before the non-renewal would take effect, Plaintiff notified Defendant, in writing, that it had decided to sell Defendant's Facility and not to renew the parties' franchise relationship upon its expiration [Facts ¶ 4; FAC Ex A] The Notice of Non-renewal cited the specific section of the PMPA upon which Plaintiff was relying, 15 U S C § 2802(b)(3)(D)(i)(III), and furthermore, explained that the franchise relationship

would not be renewed because "BPWCP ha[d] made a determination in good faith and in the normal course of business to sell the premises upon which the Facility [was] located" [FAC Ex A.] A summary statement of the PMPA was enclosed with the Notice of Non-renewal [*Id* Ex A]

There is no dispute that Defendant received written notice of non-renewal at least ninety days beforehand Defendant argues, however, that Plaintiff failed to comply with the PMPA's notice requirement because it failed to set forth the "true grounds" for its decision not to renew the parties' franchise relationship [Opp'n at 18-19] Defendant's argument is unpersuasive Plaintiff's Notice of Non-renewal provided Defendant with information sufficient for him to verify whether Plaintiff's non-renewal rested on a ground permissible under the PMPA The Act requires no more *See Svela,* 807 F 2d at 1498, *Southern Nev Shell Dealers Ass'n,* 634 F Supp at 68. Plaintiff has satisfied PMPA's second requirement as a matter of law *See* Fed. R Civ. P 56(c), *Anderson,* 477 U.S at 247-48.

C. RIGHT OF FIRST REFUSAL

The PMPA requires that a franchisor make a bona fide offer to sell its interest in the premises to the franchisee or give the franchisee an opportunity to buy the premises on the same terms as a third party offer 15 U S C § 2802(b)(3)(D)(iii) "Providing the franchisor this choice demonstrates the [PMPA]'s flexibility, more importantly, both options . . . fully reserve the price determining function to market actors" *Keener v Exxon Co.,* 32 F 3d 127, 130 (4th Cir 1994)

Here, Plaintiff pursued the second route and offered Defendant the Facility at the same price bid by a third

party. "This fact creates a strong presumption that a valid right of first refusal was extended." *Keener,* 32 F 3d at 129.

"[F]air market value is, by necessity, best set by the market itself. An actual price, agreed to by a willing buyer and a willing seller, is the most accurate gauge of the value the market places on a good" *Keener,* 32 F.3d at 129 Thus, "[w]hen a third party's offer is in the form of a single transaction for cash, the court can justifiably infer that the amount of an arms' length offer represents the value of the station. On such facts, all a franchisee is entitled to is the right of first refusal." *Ellis,* 969 F 2d at 786.

Plaintiff offers evidence that it engaged a real estate marketing company to obtain sealed bids for the facilities that it was offering for sale, including Defendant's [Facts ¶ 7, Gladstone Decl ¶ 3, Malasavage Decl. ¶ 11.] A third party attended a seminar, filled out the appropriate form, and submitted a sealed bid for Plaintiff's interest in Defendant's Facility at a purchase price of $1 2 million [Gladstone Depo Exs 545, 557 at 1, Singh Decl ¶ 5] According to the Sealed-Bid Real Estate Agreement, the purchase price explicitly excluded "the inventory, improvements, and equipment owned by the Franchisee [and] the franchise fee under the Mini Market Agreement" [Gladstone Depo Ex 557 at 2-3.] After receiving the third party bid, Plaintiff offered Defendant a right of first refusal to purchase the Facility for $1 2 million, the amount offered by the third party. [Facts ¶¶ 12, 13; FAC Ex C]

Plaintiff, then, has shown that it offered Defendant a right of first refusal at the price set by the market, the price that a third party offered to pay for the Facility *See Keener,* 32 F 3d at 129 Therefore, the Court can infer that the amount of the third party offer, $1.2 million, represents the

value of Defendant's Facility, and furthermore, that a right of first refusal to purchase the Facility at $1 2 million was valid *See id*, *Ellis,* 969 F 2d at 786. To overcome these presumptions, Defendant must present affirmative evidence that the right of first refusal extended in this case was invalid Defendant attempts to satisfy this burden in two ways Each will be addressed in turn

First, Defendant asserts that the third party offer was artificially inflated, undermining the validity of the right of first refusal, because it incorporated goodwill Defendant had accumulated in his franchise [Opp'n at 12-18][3] In support of this assertion, Defendant offers the declarations of Eve Williams, an MAI appraiser, and Surinder Pal Singh, the third party who offered to purchase Defendant's Facility

Ms Williams' appraisal offered an estimate of the "fair market value . . . a willing purchaser would pay for the fee title to the land and all of the improvements and equipment at the subject premises" [Declaration of Eve Williams ("Williams Decl") ¶ 5] According to Ms Williams' estimate, the property in question had a value of $1 million, twenty percent less than the third party offer. [*Id.*] An appraisal, however, is of little significance here, where Plaintiff has presented direct evidence of the property's market value – that is, the amount a third party offered

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[3] Defendant also argues that the third party offer was artificially inflated because it incorporated the opportunity to enter into new ARCO-branded gasoline supply and am/pm Mini Market agreements This argument, however, has been rejected by other courts and, likewise, is unpersuasive here *See Keener,* 32 F.3d at 131-32 (refusing to "transform a simple statutory requirement into a complex and cumbersome one necessitating a detailed economic analysis of private sector decisions")

for the property – and the appraisal value does not differ substantially from the third party offer *See, e g, Keener,* 32 F 3d at 129 ("An actual price, agreed to by a willing buyer and a willing seller, is the most accurate gauge of the value the market places on a good"); *Ellis,* 969 F 2d at 786 ("When a third party's offer is in the form of a single transaction for cash, the court can justifiably infer that the amount of an arms' length offer represents the value of the station") Under such circumstances, Ms Williams' appraisal is insufficient to overcome the presumption that the third party offer represents the value of Defendant's Facility and, therefore, provides a legitimate basis for a right of first refusal

Mr Singh's declaration is insufficient as well Mr Singh's declaration states that he would not have bid on Defendant's Facility if Plaintiff had not included an ARCO and am/pm Mini Market supply agreement as part of the contract [Singh Declaration ¶ 8] While this may be true, it does not suggest that Mr. Singh included the goodwill associated with Defendant's business in calculating his bid Mr Singh states that he wanted to purchase a facility where an ARCO and an am/pm Mini Market could be operated; Mr Singh does not state that he wanted to purchase this Facility because it had been, or was currently being, operated by Defendant. As a result, Mr Singh's declaration does not support an inference that he offered a higher price for the premises in question because he included value for Defendant's goodwill in the purchase price Defendant, then, has failed to provide evidence to support his assertion that goodwill artificially inflated the third party's offer, thereby invalidating the right of first refusal offered here. *See Lee v Exxon Co, U S A,* 867 F Supp. 365, 368 (D S C 1994) (goodwill theory "is not

recognized basis to vitiate or reform" sale to franchisee), *Keener,* 32 F.3d at 132, *Ellis,* 969 F.2d at 786

Second, Defendant argues that Mr Singh did not meet Plaintiff's internal criteria for operating multiple franchises and, therefore, should not have been allowed to bid on Defendant's Facility [Opp'n at 12-18.] This argument is unpersuasive To participate in the sealed bidding process for Defendant's Facility, potential buyers needed to prequalify by attending a How-To-Bid Seminar as well as an interview conducted by one of Plaintiff's representatives, and by filling out a How-To-Bid Financial and Experience Worksheet, they did not need to satisfy Plaintiff's internal policies regarding multi-site operation [Gladstone Depo. Ex 535] As a result, it is irrelevant whether Mr Singh was qualified to operate multiple franchises at the time he offered to purchase Defendant's Facility

Plaintiff has met its burden on summary judgment, it has demonstrated that it offered Defendant an opportunity to buy the premises on the same terms as a third party offer 15 U S C. § 2802(b)(3)(D)(iii) Defendant has not met his resulting burden, he has not made an affirmative showing that there is a genuine issue of material fact to be resolved at trial regarding Plaintiff's compliance with PMPA's right of first refusal provision Thus, Plaintiff has satisfied PMPA's third requirement as a matter of law. *See* Fed R Civ P 56(c), *Anderson,* 477 U S. at 247-48

V. SUPPLEMENTAL JURISDICTION

Under 28 U S C § 1367(a), the Court has jurisdiction to hear Defendant's state law counterclaim brought pursuant to California Business and Professions Code § 17200. Section 1367 provides in relevant part

> In any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution

The Court, "however, has discretion whether to retain jurisdiction over these supplemental state law claims" *Thorp v Kepoo,* 100 F Supp 2d 1258, 1263 (D Haw 2000) Section 1367(c) provides:

> The district court may decline to exercise supplemental jurisdiction over a claim under subsection (a) if (3) the district court has dismissed all claims over which it has original jurisdiction

This Court will not exercise jurisdiction over Defendant's pendent claim "In the usual case in which federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state law claims" *Thorp,* 100 F. Supp 2d at 1264 (citing *Schneider v TRW, Inc.,* 938 F 2d 986, 993 (9th Cir 1991)). The Court finds no reason to depart from the Ninth Circuit's clear preference that jurisdiction not be retained over pendent claims. Accordingly, the Court grants Plaintiff's Motion to Dismiss Defendant's state law counterclaim.

VI. CONCLUSION

For the aforementioned reasons, the Court GRANTS Plaintiff's Motion for Summary Judgment on the PMPA claims Furthermore, the Court declines to exercise supplemental jurisdiction under 28 U S C § 1367(c)(3)

over Defendant's state law counterclaim and, therefore, dismisses Defendant's unfair business practices claim without prejudice to Defendant's pursuit of that claim in state court

IT IS SO ORDERED.

Dated: February 13, 2004 /s/ Virginia A. Phillips
VIRGINIA A. PHILLIPS
United States District Judge

2006 WL 1194439

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BP WEST COAST PRODUCTS LLC, a Delaware limited liability company, Plaintiff – counter-defendant – Appellee, v. ROBERT GREENE, Defendant – counter-claimant – Appellant	No. 04-16703 D.C. No. CV-02-06257-AWI MEMORANDUM* (Filed May 4, 2006)

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted December 8, 2005
Pasadena, California

Before: PREGERSON, COWEN,** and THOMAS, Circuit Judges.

On May 1, 2006, we filed a published opinion in *B.P. West Coast Products LLC v. May*, No. 05-15076. The issues raised in this matter are substantially adjudicated in that

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

case, and for the reasons set forth therein, the order of the district court in this matter will be affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BP WEST COAST PRODUCTS LLC, a Delaware limited liability company, Plaintiff – counter-defendant – Appellee, V. ROBERT GREENE, Defendant – counter-claimant – Appellant.	No. 04-16703 D.C. No. CV-02-06257-AWI **JUDGMENT**

Appeal from the United States District Court for the Eastern District of California (Fresno).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Fresno) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 05/04/06

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

BP WEST COAST PRODUCTS,

Plaintiff,

vs.

ROBERT GREENE,

Defendant. /

JUDGMENT IN A CIVIL ACTION

CV-F-02-6257-AWI/SMS

(Filed May 3, 2004)

DECISION BY COURT: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff's motion for summary judgment is granted.

DATED: 5-3-04

JACK L. WAGNER, Clerk

By: /s/ J Hellings
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

BP WEST COAST PRODUCTS LLC, a Delaware limited liability corporation,	**CV F 02-6257 AWI/SMS**
Plaintiff,	**MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFF BP WEST COAST PRODUCT LLC'S MOTION FOR SUMMARY JUDGMENT**
v.	
ROBERT GREENE, an individual	(Documents #30 and #31)
Defendant.	(Filed Apr. 28, 2004)
AND RELATED COUNTERCLAIMS	

In this action, Plaintiff BP West Coast Products LLC ("BPWCP") requests that the court find it did not violate the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801, *et. seq.*, when BPWCP did not renew a franchise and offered to sell a Facility. Defendant Robert Greene ("Greene") has filed a counterclaim in which he contends BPWCP violated the PMPA and California Business and Professions Code § 17200. Pending before the court is Plaintiff BPWCP's motion for summary judgment on BPWCP's declaratory relief claims and Greene's counterclaims.

PROCEDURAL HISTORY

On October 11, 2002, Plaintiff BPWCP filed a complaint for declaratory relief BPWCP requests a declaratory judgment finding that BPWCP complied with its obligations

under the PMPA and that state laws concerning the subject of this dispute are preempted, or alternatively, that BPWCP complied with any applicable state laws.

On January 30, 2003, Defendant Greene filed a motion to dismiss the complaint in which he contended that the PMPA does not confer jurisdiction over an action where a franchisor requests a declaratory judgment against a franchisee. On February 14, 2003, BPWCP filed an opposition. On March 11, 2003, the court denied Greene's motion and found the court has jurisdiction over BPWCP's declaratory relief action to determine if BPWCP violated the PMPA.

On March 17, 2003, BPWCP filed a first amended complaint.

On April 9, 2003, Greene filed a counterclaim for damages and injunctive relief against BPWCP for violations of the PMPA and for restitution and injunctive relief against BPWCP and Doe Defendants under California Business and Professions Code § 17200.

On March 19, 2004, BPWCP filed a motion for summary judgment. BPWCP contends that it complied with the PMPA, and as such, BPWCP is entitled to summary judgment on all of the PMPA claims. BPWCP also contends it is entitled to summary judgment on Greene's Section 17200 claim because it is preempted by the PMPA or is not sufficiently related to the PMPA to form the same case or controversy.

On April 5, 2004, Greene filed an opposition. Greene contends BPWCP's decision and actions were not in good faith and in the normal course of business. Greene contends the bidding scheme necessarily resulted in offers,

which were used as right of first refusal offers, that included other components, such as goodwill. Greene contends BPWCP cannot rely on its notice of nonrenewal. Greene contends BPWCP is not entitled to summary judgment as a matter of law.

On April 12, 2004, BPWCP filed a reply.

LEGAL STANDARD

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Adickes v. S.H. Kress & Co.* 398 U.S. 144, 157 (1970); *Poller v. Columbia Broadcast System,* 368 U.S. 464, 467 (1962); *Jung v. FMC Corp.,* 755 F.2d 708, 710 (9th Cir. 1985); *Loehr v. Ventura County Community College Dist.,* 743 F.2d 1310, 1313 (9th Cir. 1984).

> Under summary judgment practice, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

For claims were [sic] the moving party has the burden of proof at trial, that party must carry its initial burden at summary judgment by presenting evidence affirmatively showing, for all essential elements of its case, that no reasonable jury could find for the non-moving party. *United States v. Four Parcels of Real Property,* 941 F.2d

1428, 1438 (11th Cir.1991) (en banc); *Calderone v. United States,* 799 F.2d 254, 259 (6th Cir. 1986); *see also E.E.O.C. v. Union Independiente De La Autoridad De Acueductos Y Alcantarillados De Puerto Rico,* 279 F.3d 49, 55 (1st Cir. 2002) (stating that if "party moving for summary judgment bears the burden of proof on an issue, he cannot prevail unless the evidence that he provides on that issue is conclusive.")

For claims were [sic] the "nonmoving party will bear the burden of proof at trial, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" *Celotex,* 477 U.S. at 323. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.*

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986); *First Nat'l Bank of Arizona v. Cities Serv. Co.,* 391 U.S. 253, 288-89 (1968); *Ruffin v. County of Los Angeles,* 607 F.2d 1276, 1280 (9th Cir. 1979). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the mere allegations or denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention

that the dispute exists. Rule 56(e); *Matsushita,* 475 U.S. at 586 n.11; *First Nat'l Bank,* 391 U.S. at 289; *Strong v. France,* 474 F.2d 747, 749 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Anderson,* 477 U.S. 248-49; *Wool v. Tandem Computers Inc.,* 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank,* 391 U.S. at 290; *T.W. Elec. Serv.,* 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita,* 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments); *International Union of Bricklayers v. Martin Jaska, Inc.,* 752 F.2d 1401, 1405 (9th Cir. 1985). In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); *Poller,* 368 U.S. at 468; *SEC v. Seaboard Corp.,* 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, *Anderson,* 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts

placed before the court must be drawn in favor of the opposing party, *Matsushita,* 475 U.S. at 587 (citing *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962) (per curiam); *Abramson v. University of Hawaii,* 594 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines,* 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd,* 810 F.2d 898, 902 (9th Cir. 1987).

FACTS

Until June 2003, BPWCP owned the real property and improvements of the ARCO-branded facility and AM/PM Mini Market located at 3611 S. Mooney Boulevard, Visalia California and known as Facility Number 6024 ("the Facility"). Prior to June 2003, Greene operated the Facility as a franchisee and lessee pursuant to two written franchise agreements. Greene purchased the Facility in June 2003. Although Greene no longer leases the Facility from BPWCP, the Facility was sold as an "operational ARCO/ am/pm" franchise and Greene still operates the Facility pursuant to a franchise agreement.

In 2001, after evaluating a number of facilities, BPWCP's management decided that it was in the company's best financial and business interests to recover its capital investments in the Facility by selling its interest in the real estate and improvements.[1] Greene claims BPWCP

[1] Greene offers no evidence to dispute this fact. Rather, Greene adds additional facts, which have been considered to the extent they are relevant.

not only wanted to obtain the profits from the sale of the real estate and improvements but continue to retain the profits from the sale of gasoline and royalties from the AM/PM franchisee's convenience store sales.

On July 31, 2002, almost a full year before the original June 1, 2003 expiration date of the agreements, BPWCP officially notified Greene of its decision to sell the Facility and nonrenew the parties' franchise relationship. In this Notice of Nonrenewal, BPWCP cited to PMPA Section 2802(b)(3)(D) and explained that it had decided to nonrenew the parties' franchise relationship since it "ha[d] made a determination in good faith and in the normal course of business to sell the premises upon which the Facility is located." In the Notice, BPWCP also enclosed a copy of a summary statement of the PMPA and informed Greene that it would make him either a bona fide offer to purchase the Facility or offer him a right of first refusal ("ROFR") of a third party's offer if a third party offered to purchase the Facility.

While Greene disputes some of the proposed facts concerning the Notice, Greene's dispute merely provides Greene interpretation of this document and adds additional facts. Because Greene offers no evidence to show this is not what the Notice said, the court finds the facts about the Notice are undisputed. The court does note that Greene contends the Notice failed to comply with PMPA because it merely parroted the language of the PMPA and failed to adequately state the reasons for the nonrenewal. Greene also argues that contrary to what was written in the Notice, BPWCP was willing to continue a franchise relationship at the Facility because BPWCP eventually did renew the franchise relationship for an additional 15 years.

BPWCP engaged real state marketing company National Real Estate Clearinghouse, Inc., ("NRC") as its agent for the purpose of obtaining sealed bids for the Facility. Greene offers no evidence to refute this fact. Rather, Greene adds the additional facts that NRC was to obtain bids for both the Facility and the business/franchise and NRC had obtained bids in 2000 when a number of company operated facilities were sold.[2]

An independent third party offered to purchase BPWCP's interest in the Facility for $1 million and a one-percent buyer's premium of $10,000. Greene offers evidence showing that BPWCP did not only offer to sell its interest in the Facility. BPWCP also offered to sell the franchise if a third party bought the Facility. Greene offers evidence that the Facility itself had been appraised at $765,000, or $235,000 (31%) less than the $1 million offer.

BPWCP offered Greene a ROFR to the third party offer to purchase the Facility. BPWCP's ROFR to Greene to purchase the Facility was for the exact same $1 million purchase price as the offer from the third party. BPWCP's ROFR to Greene to purchase the Facility was on the same or better terms than the offer from the third party. Greene does not offer any evidence to dispute these facts, and he merely argues that no third party bidder would have offered to purchase the Facility alone for $1 million.

Greene provides evidence that historically when ARCO wanted to sell a property and keep it as an ARCO

[2] Greene offers evidence about how BPWCP sold dealer owned dealer operated stations in 2000, and shows that BPWCP used a similar bidding process in these sales.

branded facility, ARCO would typically negotiate directly with the dealer to buy it in the normal course of business. Greene provides evidence that BPWCP had sold a number of company operated facilities, along with the relevant ARCO/am/pm franchises, in the same manner as was done in this case in 2000.

Greene provides evidence that as of February 2002, Greene's Facility was not identified as one of the facilities to be sold through the NRC bid process. It was actually identified as a facility to be sold directly to Greene rather than going through the NRC bid process.

Greene provides evidence that the third party's purchase of the Facility was conditioned upon the third party entering into a 15 year ARCO/am/pm franchise agreement. Greene argues this would allow BPWCP to sell his Franchise relationship when his current agreement expired.

Greene provides evidence that BPWCP provided prospective bidders and their lenders with confidential convenience store sales and gasoline volumes relative to the value of the business.

Greene provides evidence that BPWCP extended three ROFR offers to existing dealers in Nevada that were withdrawn and the bidders were not ready, willing, and able buyers. There is no evidence the bidder for the Facility, Parmod Kumar and his brother Anil Kumar ["the Kumars"], ever withdrew their bid or were not ready, willing, or able to buy the Facility. Greene also provides evidence that during the bidding process prospective buyers were prohibited from asking store employees or managers about the sale of a store. While Greene provides evidence other prospective buyers for other facilities may

have violated this condition, Greene has not cited evidence showing that the Kumars violated this provision.

ARCO/am/pm franchises have a financial value.

B [sic]. Judicial Notice

Both BPWCP and Greene request the court take judicial notice of court filings in other cases. BPWCP requests the court take judicial notice of an order granting the plaintiff's motion for summary judgment in *BP West Coast Products LLC v. Jasbir S. Tung,* 02-1095 VAP (SGLx), an order granting the plaintiff's application for preliminary injunction in *BP West Coast Products LLC v. Jasbir S. Tung,* 02-1095 VAP (SGLx), the first amended complaint for damages in *RNR Oils, Inc., et al v. BP West Coast Products LLC, et al.,* BC295835 in the Los Angeles County Superior Court, the complaint filed in *Anand v. BPWCP West Coast PRODUCT LLC, et al.,* BC299575 in the Los Angeles County Superior Court, and the judgment, order on cross-motions for summary judgment, and statement of uncontroverted facts and conclusions of law in *Kohanteb v. Chevron Products Company and Chevron U.S.A.. In..,* CV 00-02784 RSWL (Rcx). Greene asks that the court take judicial notice of the declaration of Jerome Thissen, and attached exhibits, filed in *BP West Coast Products LLC v. Jasbir S. Tung,* 02-1095 VAP (SGLx).

The court may take judicial notice of facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); *United States v. Bernal-Obeso,* 989 F.2d 331, 333 (9th Cir. 1993). Judicial notice may be taken of court records. *See Colonial Penn Ins. Co. v. Coil,* 887 F.2d 1236, 1239 (4th Cir. 1989); *Mullis v. United States*

Bank. Ct., 828 F.2d 1385, 1388 n.9 (9th Cir. 1987); *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir. 1980); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 635 n. 1 (N.D. Cal.1978). As such, the court will take judicial notice of the opinions, complaints, briefs, and evidence filed in other actions. *See Egan v. Teets*, 251 F.2d 571, 578 (9th Cir. 1957). However, as a general rule "a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it." *M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir.1983). In resolving this motion, the court will not take judicial notice of these documents for the truth of the facts asserted. Rather, the court will only consider these documents to show that various contentions and arguments have been raised in other actions and review how other courts have addressed these issues.

DISCUSSION

A. PMPA Violations

BPWCP requests summary judgment on BPWCP's request for declaratory relief finding it did not violate the PMPA and on Greene's counterclaim for PMPA violations. BPWCP contends that the undisputed facts show BPWCP did not violate the PMPA when selling the facility. Greene contends summary judgment as a matter of law is not appropriate.

The PMPA governs when an oil company may terminate its franchise relationships. *See* 15 U.S.C. §§ 2801-2806. The Ninth Circuit has recognized that the chief purpose of the PMPA is to remedy the disparities in

bargaining power between franchisees and franchisors in order to protect the franchisee's reasonable expectation of continuing the franchise relationship. *Unocal Corp. v. Kaabipour,* 177 F.3d 755, 762 (9th Cir. 1999). However, the PMPA is not "a one-way statute, which should single-mindedly be construed to favor franchisee positions." *Id.* at 762-63. In enacting the PMPA Congress recognized franchisors needed adequate flexibility so that they could initiate changes in their marketing activities to respond to changing market conditions and consumer preferences. *Id.* at 762. As such, the Ninth Circuit has recognized that major firms must retain the freedom to seek greater economic efficiency through corporate reorganizations, mergers, and acquisitions and requiring fixed business relationships may spell financial death to the detriment of franchisees as well as franchisors. *Id.* In addition, when enacting the PMPA, Congress desired a single uniform set of rules governing the grounds for termination and non-renewal of motor fuel marketing franchises. *Id.*

Title 28 U.S.C. § 2802 limits the situations in which a franchisor can decline to renew a franchise relationship. One ground for nonrenewal is if the franchisor in good faith and in the normal course of business decides to sell the premises. 15 U.S.C. § 2802(b)(3)(D)(i)(III). There are restrictions on termination because of a sale. The franchisor's determination cannot be made for the "purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account." 15 U.S.C. § 2802(b)(3)(D)(ii). The franchisor must timely notify the existing franchisee of its decision. 15 U.S.C. § 2802(b)(3)(D)(2). In addition, within 90 days after notification is given pursuant to 15 U.S.C. § 2804, the franchisor must (I) make a "bona fide offer to sell,

transfer, or assign to the franchisee such franchisor's interests in such premises;" **or** (II) if applicable, offer "the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises." 15 U.S.C. § 2802(b)(3)(D)(iii).

1. Decision to Sell in Good Faith and the Normal Course of Business

The PMPA requires that a franchisor make its decision to sell a facility "in good faith and the normal course of business." The PMPA's good faith requirement looks to whether a franchisor's decision is a "sham determination" used as an artifice to terminate or nonrenew a franchise. *Beck Oil Co. v. Texaco Refining & Marketing, Inc.*, 25 F.3d 559, 561-62 (7th Cir. 1994); *Ajir v. Exxon Corp.*, 1995 WL 261411, *2 (N.D. Cal. 1995). "The good faith requirement looks to whether the franchisor's actions are designed to conceal selective discrimination against individual franchises." *Kaabipour,* 177 F.3d at 767. When determining whether a decision is in good faith, the court must keep in mind that Congress did not intend "judicial second-guessing of the economic decisions of franchisors." *Svela v. Union Oil Co. of Calif.*, 807 F.2d 1494, 1501 (9th Cir.1987). The court is not to review the objective reasonableness of the franchisor's actions or substitute the court's judgment for that of the franchisor in deciding whether to sell the [sic] a facility. *Coast Village. Inc. v. Equilon Enterprises, LLC,* 163 F.Supp.2d 1136, 1175 (C.D. Cal. 2001). The test for determining good faith is subjective, and the court should look to the franchisor's intent rather than the effect of the franchisor's actions. *Svela,* 807 F.2d at 1501. In determining a franchisor's motive, the court may only review the franchisor's process and proven motive in deciding to sell

the Facility. *See Coast Village, Inc. v. Equilon Enterprises, LLC,* 163 F.Supp.2d 1136, 1175 (C.D. Cal. 2001). As long as the franchisor did not have discriminatory motive and there is no evidence the reasons given are not a pretext disguising an improper purpose, the court should find good faith. *Kaabipour,* 177 F.3d at 767; *Beck Oil,* 25 F.3d at 562; *Massey v. Exxon Corp.,* 942 F.2d 340, 344 (6th Cir. 1991).

A franchisor meets the "normal course of business" requirement if the determination was the result of the franchisor's normal decision making process. *Beck Oil,* 25 F.3d at 562. "While Congress intended the good faith test to prevent franchisors from shielding their decisions with artifice, the normal course of business element examines whether the franchisor made the choice through its usual decision-making process." *Sandlin v. Texaco Refining and Marketing Inc.,* 900 F.2d 1479, 1481 (10th Cir. 1990).

On the record before the court, the court finds no disputed issue of fact on whether BPWCP's decision to sell the Facility was in good faith and in the normal course of business. BPWCP has provided evidence that BPWCP decided to sell the Facility as part of an annual evaluation of capital employed and market performance for its retail facilities in accordance with its overall business strategy. Greene does not specifically dispute BPWCP's evidence. However, Greene argues that BPWCP wanted to sell the Facility to keep the profits of both a sale of the real estate and improvements making up the Facility and continue to retain profits as the franchisor from the sale of gasoline and royalties from the ARCO/am/pm convenience store sales. Even if Greene is correct and BPWCP's motive was based in part to obtain money from an immediate sale and continue to receive money in the future from the franchise, the court does not find this an improper motive made in

bad faith. Greene cites no law to support the proposition that a decision made for a franchisor's financial gain is in bad faith or not in the normal course of business. This court finds no violation of Section 2802(b)(3)(D)(I) merely because BPWCP made the decision to sell the Facility in part because it would be profitable.

In arguing BPWCP's decision was not in good faith and in the normal course of business, Greene points to the bidding system used by BPWCP. Greene argues that "it is not enough that BPWCP's decision to sell GREENE's premises by including it in the NRC bidding scheme be in good faith and in the normal course of business. The system set up by BPWCP to carry out such sale must be in good faith and in the normal course of business as well." Greene cites no support for this proposition. And, absent a requirement that the court must also review the bidding process in determining good faith and in the normal course of business, the court is not inclined to add this requirement. Section 2802(b)(3)(D) only requires that the "determination" to sell a facility be "made by the franchisor in good faith and in the normal course of business."

At best, evidence regarding impropriety in BPWCP's bidding process is circumstantial evidence that its underlying decision to sell the Facility was not in good faith and in the normal course of business. However, Greene has failed to provide sufficient evidence of irregularities regarding the sale of the Facility to support an inference that the underlying decision to sell was in bad faith and not in the normal course of business to refute BPWCP's evidence. Evidence that BPWCP had originally marked the Facility to be offered to Greene directly does not show an underlying theme of bad faith when BPWCP ultimately

decided to allow bids on the Facility and the law clearly allowed the Facility to be sold through such a procedure. The fact other franchisees were given ROFR based on third party bids even though the third party was not willing and able to pay the bid does not show any bad faith on the part of BPWCP in this sale. There is no evidence the Kumars were not legitimate third party bidders who stood ready to pay the $1 million offer price if Greene declined his right of first refusal. There is also no evidence BPWCP allowed the Kumars to violate BPWCP's own rules regarding contact with people working at the Facility.

The only allegation of impropriety by BPWCP for which Greene has evidence is Greene's allegation that BPWCP provided potential bidders with the volume and sales history for the Facility. Alan Delisle and Even Gladstone stated that volume and sales history were given as part of the bidding process and the bid package included this information for the Facility. *See* Delisle Depo. at 128-29; Gladestone Depo. at 220 & Exhibit page 535. Delisle and Gladstone admitted that this information is generally considered confidential by BPWCP and they would be reluctant to disclose this information. *See* Delisle Depo. at 128-29; Gladestone Depo. at 220. Gladstone explained the information was confidentially given to bidders because it would help them value the businesses. *See* Gladestone Depo. at 222-23 & Exhibit page 535. The court agrees that providing this information may have given the bidders an incentive to bid high on Facilities that were profitable. However, Greene fails to provide the authority making BPWCP's conduct illegal or improper. The fact BPWCP generally considered this information confidential does not make the decision to give it to potential bidders improper.

The court finds no evidence that the business decision to provide this information was inappropriate; the court would presume bidders would want this information when bidding to know an appropriate bid. The court simply does not find such conduct sufficient circumstantial evidence that the underlying decision to sell was in bad faith and not in the normal course of business to refute BPWCP's direct evidence to the contrary. Thus, the court finds no disputed issue of material fact on whether BPWCP made its decision to sell the Facility in good faith and in the normal course of business.

2. Notice

The PMPA requires a franchisor to notify an existing franchisee that a franchise will not be renewed at least ninety days before the nonrenewal takes effect. *See* 15 U.S.C. § 2902. Such notice shall be in writing and "shall be posted by certified mail or personally delivered to the franchisee." 15 U.S.C. § 2902(b)(1)&(2). The Notice must contain "a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor." 15 U.S.C. § 2902(b)(3)(A).

BPWCP has provided evidence that on April 22, 2002, BPWCP notified Greene that it was considering selling its interests in the Facility and nonrenewing the parties' lease franchise relationship. On July 31, 2002, BPWCP notified Greene that it had decided to sell the Facility and nonrenew the franchise relationship. The Notice informed Greene that the franchise would not be renewed because "BPWCP ha[d] made a determination in good faith and in the normal course of business to sell the premises upon which the Facility is located."

Greene claims the Notice did not provide sufficient reasons for the termination. The court disagrees. The Notice clearly indicated that the franchise was not being renewed due to BPWCP's decision to sell the premises. Greene was informed of his rights to purchase the Facility. While the Notice was concise, the court finds it sufficient to have provided Greene with the reason for the nonrenewal.

Greene also argues that the Notice was incorrect because it stated BPWCP did not intend to renew the franchise, but in reality, once the Facility had been sold BPWCP did renew the franchise relationship. The court finds no merit to this argument. There is no evidence that at the time BPWCP wrote the Notice, BPWCP was in fact planning to renew the franchise. BPWCP wanted to sell the Facility, and BPWCP could not both promise to renew Greene's franchise and sell the Facility because the Facility may have been sold to another buyer. Greene was also informed about his rights to purchase the Facility and of the terms under which BPWCP would give him a new franchise. Finally, the original franchise relationship Greene had with BPWCP did terminate. Greene now has a contract dealer franchise instead of a franchise as a lessee of the station. While in practical terms the two types of franchises may be similar, Greene has not shown a disputed issue of material fact that at the time BPWCP sent the letter BPWCP really intended to renew Greene's old franchise agreement.

3. Third Party Offer

Before selling a facility, a franchisor must give the franchisee an offer to purchase the facility. 15 U.S.C.

§ 2902(b)(3)(D)(iii). Section 2902(b)(3)(D)(iii) provides that in the case of a leased marketing premises, the franchisor must "either – (I) [make] a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or (II) if applicable, [offer] the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises." In this case, BPWCP followed the second option and offered Greene the right of first refusal to purchase the Facility.

Greene appears to contend that the $1 million third party offer was not a valid third party offer because of various improper conduct that occurred during the bidding process. First, Greene provides evidence concerning third party bidders and bids for facilities in Nevada. Greene offers evidence that third party offers were used in these sales even though the third party was not able and willing to buy the facility at the time the offer was given to franchisee. The court finds this evidence has no relevance to whether the third party offer Greene was given was legitimate. There is no evidence the Kumar Partnership did not have adequate financing or had withdrawn their bid by the time it was offered to Greene. Thus, the court finds evidence concerning BPWCP's sale of other facilities does not create a disputed issue of material fact on whether the offer given to Greene was legitimate.

Second, Greene contends that the $1 million third party purchase price was inflated by the bidding process. Greene cites to the evidence showing BPWCP provided confidential sales information. As discussed above, the court does not find providing this information was improper and illegally inflated the price of the Facility. While BPWCP considered the information confidential, Greene

has cited no authority for the proposition it was inappropriate for BPWCP to confidentially provide this information to bidders, and the court finds such information would have been helpful to potential bidders to make the bidding process as informative as possible. The court finds nothing in the PMPA prohibits a third party from receiving information about potential future profits.

Third, Greene contends he was required to pay for more than the fair market value of the Facility because the third party bid included other arrangements. Greene provides evidence from an appraiser who has apprised [sic] the Facility at only $765,000. Greene takes the position that he should not have had to pay the third party purchase price because BPWCP had offered to also sell the ARCO/am/pm franchise if a third party bought the Facility. In other words, Greene claims the $1 million was for more than the Facility because it included the promise to purchase the ARCO/am/pm franchise in the future. Greene argues that without the promise of the franchise, third party bidders would likely not bid such a large sum.

"[B]idders routinely come to the table with different hands." *Keener v. Exxon Company, U.S.A.*, 32 F.3d 127, 132 (4th Cir.1994). A prospective buyer who does not currently have a franchise would come to the table with different needs than a prospective buyer who already has a franchise and is currently leasing a facility for sale. This does not make that third party's offer for the particular site any less legitimate. "An actual price, agreed to by a willing buyer and a willing seller, is the most accurate gauge of the value the market places on a good." *Id.* 32 F.3d at 132. That price is a measure of what the station is worth to a purchaser in the third party's position. The court can infer that such an amount represents the value

of the facility. *Ellis v. Mobil Oil*, 969 F.2d 784, 786 (9th Cir. 1992). The presumption of validity to third party bids "comports with the desire not to transform a simple statutory requirement into a complex and cumbersome one necessitating a detailed economic analysis of private sector decisions." *Keener*, 32 F.3d at 131.

Case law refutes the argument that a third party offer does not comply with Section 2902(b)(3)(D)(iii)(II) if the deal given to the third party differs from the exact arrangement offered to the franchisee. For example, in *Arnold v. Amoco Oil Co.*, 872 F.Supp. 1493 (W.D.Va.1995), a franchisor offered the franchisee a right of first refusal on a third party's offer to buy facilities. The third party had also bid on other facilities and the arraignment [sic] with the third party included an accompanying offer for a supply agreement. *Id.* at 1496-99. The franchisor only offered to sell the franchisee two of the facilities and offered no supply agreement. *Id.* at 1500 & n.6. The court found such a practice acceptable because each facility had been assigned a specific price by the third party and despite the fact the third party's offer included promises of other offers. *Id.* at 1500.

In *Keener v. Exxon Company, U.S.A.*, 32 F.3d 127 (4th Cir.1994), the Fourth Circuit Court of Appeals reviewed the propriety under the PMPA of Exxon's non-renewal of a franchise and offer to sell a station at the same price bid by a third party. The franchisee had operated a station in West Virginia which Exxon decided to sell as part of its plan to phase out the use of dealer-operated stations and convert to distributor-owned sites. *Id.* at 129. Exxon notified Keener of a third party bid and gave Keener a right of first refusal. *Id.* Although Keener chose not to match the third party bid, he protested the terms of the

offer and filed suit seeking sale of the property at its fair market value. *Id.* Keener argued that Exxon had not made a valid offer under the PMPA to him because the third party offer included a promise by Exxon to supply the third party with a supply of gasoline, which he was not offered. *Id.* at 132-33. In rejecting his argument and finding that Keener could have availed himself of an opportunity to assure a similar allotment of gasoline from Exxon, the court emphasized that evidence that the franchisor offered the franchisee the station at the same price offered by a third party creates a strong presumption of statutory compliance. *Id.* In addition, the court did not find the fact the plaintiff's evidence showed the facility was worth $547,000 and the facility sold for $1,200,010 raised a triable question as to whether the PMPA's right to first refusal provision had been violated. *Id.* at 132. The court reasoned a fair market value is abstract and speculative and an "actual price, agreed to by a willing buyer and a willing seller, is the most accurate gauge of the value the market places on a good." *Id.* Thus, the court held that Keener's assertions failed to raise a triable issue of fact as to Exxon's compliance with the right of first refusal provision of the PMPA. *Id.* at 132-33.

In *Ballis v. Mobil Oil*, 622 F.Supp. 473 (D.C. Ill. 1985), the plaintiff was given the right of first refusal on a station. The plaintiff contended that the PMPA required Mobil to sell him the franchise at a fair and reasonable price notwithstanding a higher offer from the third party. *Id.* at 474. The court rejected the argument that Mobil had to take a $110,000 loss because the plaintiff wished to purchase the station for less than the third party. *Id.* at 475. The court reasoned that Mobil only needed to give the plaintiff the right to match a third party purchaser's offer,

but was not obligated to give any special price discounts. *Id.* There was no argument in *Ballis* that the $110,000 difference between the third party offer and what the plaintiff believed was a bona fide offer was for the facility's "goodwill" or for some promise of a franchise to sell gas in the future. However, *Ballis* provides authority that a third party offer can be higher than what the franchisee believes is a fair market value.

The plaintiff in *Lee v. Exxon*, 867 F.Supp. 365 (D.S.C. 1992), purchased the facility after the defendant had received a bid from a third party and provided the plaintiff with his right of first refusal. *Id.* at 366. The plaintiff sought to reform the sale alleging that Exxon had sold goodwill belonging to him because the third party's bid was higher than what the plaintiff believed was the market value for the facility. *Id.* at 368. The court disagreed and found that not only had the plaintiff failed to provide any evidence to support his claim that goodwill attached to the premises, but a goodwill theory is not a recognized basis to vitiate or reform a sale. *Id.* at 368.

Based on this case authority, the court finds the fact the third party bid may have included a promise or understanding that the third party would be given a franchise in the future does not make the third party bid violate the PMPA. This is not the case where the deal between the third party and BPWCP included the purchase of the Facility and the franchise. Arguably, if the $1 million had included a license to operate the Facility as an ARCO-branded facility and the ARCO/am/pm franchise, this purchase price included more than the Facility alone. However, BPWCP provides evidence that bidders such as the Kumars were told they were not purchasing the existing franchises. Gladstone Decl. ¶ 9. The Facility alone

was sold, and the successful bidder would need to reach its own franchise agreement with BPWCP. Gladstone Decl. Exhibit B. Greene offers no evidence to show that the bid by the Kumars included the franchise. Greene is correct that the bid from the Kumars' [sic] included an understanding that they would be given the right to enter into an agreement with BPWCP for the franchise and licenses. However, not only was Greene given this option, but Greene was given even further options. If Greene choose to buy the Franchise, Greene, just like the Kumars, was given the option of entering into a "contract dealer franchise relationship for fifteen years." In addition, Greene, was given the option of continuing to operate under his existing franchise agreement until the end of the term, at which time he could debrand and sell other gasoline. *See* BPWCP's Amended Complaint Exhibit E. In light of the above cases, the court does not find that because the third party offer included something different than offered to Greene, the third party offer is not legitimate.

Greene relies on *Ellis v. Mobil Oil*, 969 F.2d 784 (9th Cir. 1992), for the proposition that a third party offer that includes other factors is not allowed by Section 2802(b)(3)(D)(iii)(II), and in such a circumstance, a bona fide offer must be given. The plaintiff in *Ellis*, like Greene, operated a Mobil gasoline service station in Arizona as a lessee. *Id.* at 785. Mobil negotiated with Union Oil Company of California for the exchange of six Union Oil stations in Florida for eight Mobil stations in California and Arizona. *Id.* Mobil offered the plaintiff a right of first refusal on his station by offering to sell the station for $581,000, which was the value Union Oil internally placed on the station for the purposes of the exchange. *Id.* The

Ninth Circuit stated as follows regarding the legitimacy of the third party offer.

> When a third party's offer is in the form of a single transaction for cash, the court can justifiably infer that the amount of an arms' length offer represents the value of the station. On such facts, all a franchisee is entitled to is the right of first refusal. *See Ballis v. Mobil Oil Corp.*, 622 F.Supp. 473, 475 (N.D.Ill.1985). With an exchange agreement, one can infer from the fact that a transaction takes place that the exchanged items are of equal value, but the monetary value of the exchanged items is not necessarily apparent from the face of the transaction. If the exchange involves multiple properties, as in the present case, a stranger to the exchange would not necessarily know either the value of the entire package, or the value of any one of the independent components.

Ellis, 969 F.2d at 786. Because the third party offer was for numerous stations, the Ninth Circuit found the $581,000 third party offer was not a true third party offer. Besides the package nature of the third party offer for numerous stations, the Ninth Circuit noted some of the stations had been valued at zero for the purposes of the exchange agreement, which would have inflated the internal valuation of the plaintiff's station. *Id.* The Ninth Circuit concluded that because the right of first refusal was not applicable, Mobil was obligated to extend the plaintiff a bona fide offer. *Id.* The Ninth Circuit found that a bona fide offer would reflect what a willing purchaser would pay for the fee title of the land, the improvements, and equipment, and such a "bona fide offer in this case would not include the value of the franchisee's own goodwill or Mobil's franchise value of the station." *Id.* at 788.

The Ninth Circuit remanded to determine if the offer made by Mobil was bona fide. *Id.*[3]

Contrary to Greene's position, The Ninth Circuit did not find the third party offer invalid because it included the value of "independent components." Rather, the court refused to allow Mobil to proceed as a third party offer because the offer involved multiple facilities and it was impossible to determine the value of any one of them. The court finds such an offer different than the one made by the Kumars in this case. The Kumars' offer was for only one facility. Greene's position is that since an appraiser valued the property for less than the $1 million offer, the offer "must have" included some other component. Greene claims this component was the promise to give the Kumars a license and franchise in the future. The court finds this situation not prohibited by *Ellis.* The purpose behind allowing a third party's offer instead of a bona fide offer is that the court can infer that the amount of an arms' length offer represents the value of the station. That a third party may have considered future business opportunities when giving a third party offer does not make the third party offer invalid. In this case, Greene provided no evidence of what the Kumars considered in making their bid. While the Kumars were promised a future franchise if they bought the property, as discussed above, Greene was given the same promise. Thus, the court cannot find that the Kumars' third party offer included such different

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[3] Congress' use of the term "bona fide" rather than "fair market value" in the statute indicates a recognition that the word value almost always involves a conjecture, a guess, a prediction, a prophecy. *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 485 (3d Cir.1987). "[T]here is no universally infallible index of fair market value." *Id.*

components as the offer given to Greene that the court cannot find it to be a legitimate third party offer.

Fourth, Greene contends that there was impropriety in the bidding process. The court finds no evidence that the Kumars' bid was not the result of an arms length negotiation. BPWCP has provided evidence that it engaged a real estate marketing company to obtain sealed bids for the Facility. There is no evidence the Kumars did not follow the arranged bidding process. There is no evidence the bidding process was not open to others or that the Kumars received inside information not given to other bidders. There is no evidence the Kumars were not ready and willing to pay the $1 million if Greene decided not to purchase the Facility. There is no evidence the Kumars' offer for the Facility was a sham, tainted by fraud or that the Kumars and BPWCP were colluding to cause an arbitrary termination of Greene's franchise. Simply put, there is no evidence showing the $1 million bid by the Kumars was not the result of an arms length negotiation.

Fifth, related to Greene's argument that the $1 million included a separate promise regarding the ARCO/am/pm franchise, Greene contends that the $1 million included Greene's goodwill in the facility. Greene has provided evidence from one appraiser who appraised the facility at $765,000. However, the court finds this apprisal [sic] does not create a dispute issue of fact regarding the legitimacy of the third party offer in light of the fact there is direct evidence of the property's market value – that is, the price a third party offered for the Facility. Given there is no evidence of impropriety surrounding the Kumars' bid or evidence the bid did not represent an arms length negotiation, the court finds the court can infer the bid represented a reasonable market price. The difference

between Greene's evidence of the facility's value and the third party's offer are not nearly as great as there was in *Keener*, and the court does not find the differences substantial. Thus, the court finds no violation of the PMPA.

In this case, the evidence is undisputed that BPWCP exercised its rights to sell the Facility on a good faith business decision in the normal course of business. The undisputed evidence also shows that BPWCP's written offer and subsequent correspondence complied with the requirements of 15 U.S.C. § 2802(b)(3)(D)(iii). The offer which Greene accepted was the same offer extended to Exxon by a third party operating under normal market forces. As the Keener court observed, "An actual price, agreed to by a willing buyer and a willing seller, is the most accurate gauge of the value the market places on a good. Until such an exchange occurs, the market value of an item is necessarily speculative." *Keener*, 32 F.3d at 132. Greene has failed to come forward with evidence sufficient to overcome the statutory presumption as to the propriety of this transaction. Nothing written in the bid from the Kumars included the value of the Facility's goodwill. A franchisee only has "the right to match" the terms of the contract between the franchisor and the prospective buyer, and the franchisee is not entitled to any special price. *Ballis*, 622 F.Supp. at 475. Greene was afforded that opportunity here. As such, the right of first refusal was adequate. Accordingly, the court finds summary judgment in favor of BPWCP appropriate on the PMPA claims.

B. Remaining State Law Claim

The remaining claim in this action is Greene's state law claim brought under California Business and Professions

Code § 17200. BPWCP contends that this claim is preempted by the PMPA. If the court finds the PMPA does not preempt this claim, BPWCP asks that the court decline to exercise jurisdiction over this claim because it is currently being litigated in a state court action.

"[P]endant jurisdiction is a doctrine of discretion not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to the litigants; if these are not present, a federal court should hesitate to exercise jurisdiction over state claims." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). In *Nishimoto v. Federman-Bachrach & Associates*, 903 F.2d 709, 715 (9th Cir.1990), the Ninth Circuit made clear that once no federal claims remain in a given case, it is within the discretion of the district court to determine whether to dismiss the remaining claims. The court may decline to exercise supplemental jurisdiction over state claims when the federal claims are dismissed before trial. *See* 28 U.S.C. § 1367(c)(3); *Gibbs*, 383 U.S. at 726.

In this case, the federal claims brought under the PMPA have been resolved. The remaining state claim in this action concerns unfair business practices. Defining this standard in regard to selling gas stations is of importance to the people of this state. This court has yet to expend significant resources to resolve Greene's Section 17200 claim, and the court has never even considered the merits of the Section 17200 claim. The essential basis of Greene's Section 172000 [sic] is already pending in a state court action before the state court. The court will, therefore, decline to exercise its

pendant jurisdiction and dismiss the remaining claim without prejudice.[4]

The court notes that in Greene's opposition he discusses BPWCP's alleged violation of California Business and Professions Code § 20999.25. Greene claims he should have received an offer to purchase the Facility under this provision prior to BPWCP's Notice. Such a claim is not currently before this court. It appears Greene has raised this claim in two related state court actions. Because this claim is not in the current action, the court will not address Greene's allegations. In addition, for the reasons discussed above, the court will decline to exercise supplemental jurisdiction over such a claim in the event Greene moves to amend his counterclaim.

ORDER

Accordingly, for the reasons stated in the above memorandum opinion, the court ORDERS that:

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[4] Because the court declines to exercise jurisdiction over the remaining Section 17200 claim, it is unnecessary to determine if it is also preempted by the PMPA. The Ninth Circuit takes a restrictive approach to preemption under the PMPA. The Ninth Circuit limits the scope of preemption to those state laws that regulate the grounds for, procedures for, and notification requirements of termination or nonrenewal. *See, e.g., Unocal Corp. v. Kaabipour*, 177 F.3d 755 (9th Cir.1999); *see also O'Shea v. Amoco Oil Co.*, 886 F.2d 584 (3rd Cir.1989); *Bellmore v. Mobil Oil Corp.*, 783 F.2d 300, 304 (2d Cir.1986). State law that "only incidentally affect franchise termination or nonrenewal" are not preempted. *Kaabipour*, 177 F.3d at 768. Given this standard, it is unclear whether Greene's Section 17200 claim based on the totality of Greene's conduct in selling the Facility is preempted.

1. BPWCP's motion for summary judgment is GRANTED;

2. BPWCP is GRANTED summary judgment on BPWCP's declaratory relief action because BPWCP did not violate the PMPA;

3. BPWCP is GRANTED summary judgment on Greene's counterclaim because BPWCP did not violate the PMPA;

4. The court DECLINES to exercise jurisdiction over the remaining state law claim; and

5. Greene's state law claim is DISMISSED WITHOUT PREJUDICE to refiling in state court

DATED: April 27, 2004

/s/ A.W. Ishii
ANTHONY W. ISHII
UNITED STATES
DISTRICT JUDGE

15 U.S.C. § 2801. Definitions

As used in this title [15 USCS §§ 2801 et seq.]:

(1)(A) The term "franchise" means any contract –

(i) between a refiner and a distributor,

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer, under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes –

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed –

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15,

1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(iii) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who –

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with the sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include –

(A) any failure which is only technical or unimportant to the franchise relationship;

(B) any failure for a cause beyond the reasonable control of the franchisee; or

(C) any failure based on a provision of the franchise which is illegal or unenforceable under the law of any State (or subdivision thereof).

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship –

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after the date of enactment of this Act [enacted June 19, 1978]) of the relevant franchise which was entered into prior to such date of enactment and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

(16) The term "relevant geographic market area" includes a State or a standard metropolitan statistical area as periodically established by the Office of Management and Budget.

(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce –

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

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15 U.S.C. § 2802. Franchise relationship

(a) General prohibition against termination or nonrenewal. Except as provided in subsection (b) and section 103 [15 USCS § 2803(b)], no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may –

(1) terminate any franchise (entered into or renewed on or after the date of enactment of this Act [enacted June 19, 1978]) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

(b) Precondition and grounds for termination or nonrenewal.

(1) Any franchisor may terminate any franchise (entered into or renewed on or after the date of enactment of this Act [enacted June 19, 1978]) or may fail to renew any franchise relationship, if –

(A) the notification requirements of section 104 [15 USCS § 2804] are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure –

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 104(a) [15 USCS § 2804(a)]; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 104(b)(1) [15 USCS § 2804(b)(1)].

(B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if –

(i) the franchisee was apprised [sic] by the franchisor in writing of such failure and was afforded a reasonable

opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 104 [15 USCS § 2804].

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence –

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 104(a) [15 USCS § 2804(a)]; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 104(b)(1) [15 USCS § 2804(b)(1)].

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if –

(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days prior to the conclusion of the term or the expiration date, stated in the franchise;

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 104(d) [15 USCS § 2804(d)]; and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to the date of the enactment of this Act [enacted June 19, 1978], and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if –

(i) such determination –

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises –

(I) the franchisor, during the 180-day period after notification was given pursuant to section 104 [15 USCS

§ 2804], either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if –

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for the benefit of the franchisor or otherwise preventing the renewal of the franchise relationship.

(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if –

(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(D) In the case of any franchise entered into prior to the date of the enactment of this Act [enacted June 19, 1978] (the unexpired term of which, on such date of enactment, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if –

(i) such determination is –

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 104 [15 USCS § 2804], either –

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

(c) Definition. As used in subsection (b)(2)(C), the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as –

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if –

(A) the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise –

(i) of the duration of the underlying lease; and

(ii) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

(B) during the 90-day period after notification was given pursuant to section 104 [15 USCS § 2804], the franchisor offers to assign to the franchisee any option to extend the underlying lease or option to purchase the marketing premises that is held by the franchisor, except that the franchisor may condition the assignment upon receipt by the franchisor of –

(i) an unconditional release executed by both the landowner and the franchisee releasing the franchisor from any and all liability accruing after the date of the assignment for –

(I) financial obligations under the option (or the resulting extended lease or purchase agreement);

(II) environmental contamination to (or originating from) the marketing premises; or

(III) the operation or condition of the marketing premises; and

(ii) an instrument executed by both the landowner and the franchisee that ensures the franchisor and the contractors of the franchisor reasonable access to the marketing premises for the purpose of testing for and remediating any environmental contamination that may be present at the premises; and

(C) in a situation in which the franchisee acquires possession of the leased marketing premises effective immediately after the loss of the right of the franchisor to grant possession (through an assignment pursuant to subparagraph (B) or by obtaining a new lease or purchasing the marketing premises from the landowner), the franchisor (if requested in writing by the franchisee not later than 30 days after notification was given pursuant to section 104 [15 USCS § 2804]), during the 90-day period after notification was given pursuant to section 104 [15 USCS § 2804] –

(i) made a bona fide offer to sell, transfer, or assign to the franchisee the interest of the franchisor in any improvements or equipment located on the premises; or

(ii) if applicable, offered the franchisee a right of first refusal (for at least 45 days) of an offer, made by another person, to purchase the interest of the franchisor in the improvements and equipment.

(5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) failure by the franchisee to operate the marketing premises for –

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

(d) Compensation, etc., for franchisee upon condemnation or destruction of marketing premises. In the case of any termination of a franchise (entered into or renewed on or after the date of enactment of this Act [enacted June 19, 1978]), or in the case of any nonrenewal of a franchise relationship (without regard to the date on which such franchise relationship was entered into or renewed) –

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5), the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

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15 U.S.C. § 2803. Trial and interim franchises

(a) Nonapplicability of statutory nonrenewal provisions. The provisions of section 102 [15 USCS § 2802] shall not apply to the nonrenewal of any franchise relationship –

(1) under a trial franchise; or

(2) under an interim franchise.

(b) Definitions. For purposes of this section –

(1) The term "trial franchise" means any franchise –

(A) which is entered into on or after the date of enactment of this Act [enacted June 19, 1978];

(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(C) the initial term of which is for a period of not more than 1 year; and

(D) which is in writing and states clearly and conspicuously –

(i) that the franchise is a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 104 [15 USCS § 2804], of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 102 [15 USCS § 2802], limiting the right of a franchisor to fail to renew a franchise relationship, are not applicable to such trial franchise.

(2) The term "trial franchise" does not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent authorized by the provisions of the franchise or any applicable provision of State law which permits such transfer or assignment, without regard to any provision of the franchise.

(3) The term "interim franchise" means any franchise –

(A) which is entered into on or after the date of the enactment of this Act [enacted June 19, 1978];

(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(C) the effective date of which occurs immediately after the expiration of a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal –

(i) was based upon a determination described in section 102(b)(2)(E) [15 USCS § 2802(b)(2)(E)], and

(ii) the requirements of section 102(b)(2)(E) [15 USCS § 2802(b)(2)(E)] were satisfied; and

(D) which is in writing and states clearly and conspicuously –

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located if the requirements of section 102(b)(2)(E)(ii) and (iii) [15 USCS § 2802(b)(2)(E)(ii) and (iii)] are satisfied.

(c) Nonrenewal upon meeting statutory notification requirements. If the notification requirements of section 104 [15 USCS § 2804] are met, any franchisor may fail to renew any franchise relationship –

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if –

(A) such nonrenewal is based upon a determination described in section 102(b)(2)(E) [15 USCS § 2802(b)(2)(E); and

(B) the requirements of section 102(b)(2)(E)(ii) and (iii) [15 USCS § 2802(b)(2)(E)(ii) and (iii)] are satisfied.

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15 U.S.C. § 2804. Notification of termination or nonrenewal of franchise relationship

(a) General requirements applicable to franchisor. Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship –

(1) in the manner described in subsection (c); and

(2) except as provided in subsection (b), not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

(b) Additional requirements applicable to franchisor.

(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) –

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor –

(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins –

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and (ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 102(b)(2)(E) or section 103(c)(2) [15 USCS §§ 2802(b)(2)(E) or 2803(c)(2)], the franchisor shall –

(A) furnish notification to the franchisee not less than 180 days prior to the date on which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

(c) Manner and form of notification. Notification under this section –

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain –

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d).

(d) Preparation, publication, etc., of statutory summaries.

(1) Not later than 30 days after the date of enactment of this Act [enacted June 19, 1978], the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this title [15 USCS §§ 2801 et seq.], including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this title [15 USCS §§ 2801 et seq.].

(2) In the case of summaries required to be furnished under the provisions of section 102(b)(2)(D) [15 USCS § 2802(b)(2)(D)] or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions.

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15 U.S.C. § 2805. Enforcement provisions

(a) Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action. If a franchisor fails to comply with the requirements of section 102 or 103 [15 USCS § 2802 or 2803], the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of –

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 102 or 103 [15 USCS § 2802 or 2803].

(b) Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers.

(1) In any action under subsection (a), the court shall grant such equitable relief as the court determines is

necessary to remedy the effects of any failure to comply with the requirements of section 102 or 103 [15 USCS § 2802 or 2803], including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief

(2) Except as provided in paragraph (3), in any action under subsection (a), the court shall grant a preliminary injunction if –

(A) the franchisee shows –

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief

(4) In any action under subsection (a), the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced –

(A) more than 90 days after the date on which notification pursuant to section 104(a) [15 USCS § 2804(a)] was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 104(b)(2) [15 USCS § 2804(b)(2)] was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 104(b)(1) [15 USCS § 2804(b)(1)].

(c) Burden of proof; burden of going forward with evidence. In any action under subsection (a), the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 102(b) or 103 [15 USCS § 2802(b) or 2803], and, if applicable, that such franchisor complied with the requirements of section 102(d) [15 USCS § 2802(d)].

(d) Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions.

(1) If the franchisee prevails in any action under subsection (a), such franchisee shall be entitled –

(A) consistent with the Federal Rules of Civil Procedure [USCS Court Rules, Federal Rules of Civil Procedure], to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 102 or 103 [15 USCS § 2802 or 2803], or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a), the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

(e) Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected.

(1) In any action under subsection (a) with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 102 [15 USCS § 2802], the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that –

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business –

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 104 [15 USCS § 2804] have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) if such nonrenewal is prohibited by section 102 [15 USCS § 2802].

(f) Release or waiver of rights.

(1) No franchisor shall require, as a condition of entering into or renewing the franchise relationship, a franchisee to release or waive –

(A) any right that the franchisee has under this title [15 USCS §§ 2801 et seq.] or other Federal law; or

(B) any right that the franchisee may have under any valid and applicable State law. (2) No provision of any franchise shall be valid or enforceable if the provision specifies that the interpretation or enforcement of the franchise shall be governed by the law of any State other than the State in which the franchisee has the principal place of business of the franchisee.

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15 U.S.C. § 2806. Relationship of statutory provisions to State and local laws

(a) Termination or nonrenewal of franchise.

(1) To the extent that any provision of this title [15 USCS §§ 2801 et seq.] applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this title [15 USCS §§ 2801 et seq.].

(2) No State or political subdivision of a State may adopt, enforce, or continue in effect any provision of law

(including a regulation) that requires a payment for the goodwill of a franchisee on the termination of a franchise or nonrenewal of a franchise relationship authorized by this title.

(b) Transfer or assignment of franchise.

(1) Nothing in this title [15 USCS §§ 2801 et seq.] authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) Nothing in this title [15 USCS §§ 2801 et seq.] shall prohibit any State from specifying the terms and conditions under which any franchise or franchise relationship may be transferred to the designated successor of a franchisee upon the death of the franchisee.